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NOTES OF RECENT CASES.

Srinivasan, J.
22nd January, 1965.

Banda Brothers *v.* The Board of Revenue, Madras.
W.P. Nos. 38 and 39 of 1963.

Madras General Sales Tax Act (*X of* 1939) *and Constitution of India* (1950), *Article* 286 (2)—*Inter-State transactions—Return of sales tax to constituent—Specific direction by Government to assessing authorities not to assess non-residents who had returned the tax—Order of Board of Revenue without affording an opportunity to the party to explain his claim—Writ of* certiorari.

The Government order in question incorporates the specific direction to the assessing authorities not to assess non-resident dealers who had either not collected the tax or after collection had refunded it. It was the duty of the appropriate authorities to have examined the evidence tendered by the petitioners in this regard. Though the evidence was considered it was only considered in part and the entirety of the evidence consisting of the account books and other records was not scrutinised. The Board of Revenue gave no notice to the petitioners nor did it give the petitioners an opportunity of showing how they came within the scope of Government order. It is clearly the case where the assessing authorities who are bound to obey lawful direction issued by the Government in the shape of Government order have failed to perform their duty. The orders of the Board necessarily have to be quashed.

T. V. Viswanatha Iyer for *C. Vasudevan*, for Petitioner.

The Additional Government Pleader on behalf of Respondent.

V.S. *Petition allowed.*

Ramamurti, J.
5th February, 1965.

Olimuthu *v.* The State of Madras
W.P. No. 107 of 1965.

Madras Panchayats Act (*XXXV of* 1958), *Sections* 3 *and* 157—*Bifurcation and amalgamation of panchayats—Power of Government and Inspector—Scope of—Relevancy of appeal from order of Inspector to Government.*

Under section 157 (5) of the Act it is open to the Government to issue the direction in question for the purpose of amalgamation of the two panchayats if the Government was satisfied that the interests of the two panchayats required the proposed amalgamation. The Government will have overriding power to control and impose any restriction or condition with regard to the powers which have been conferred upon the Inspector under the Act. The Inspector may himself start the proposals taking the view that such proposal is conceived in the interest of the

Panchayats concerned. There can be a case in which the Inspector may not move at all and representations may be received by the Government from the villagers and there is nothing in the Act which would prevent the Government from being *prima facie* satisfied, that a case for amalgamation is made out requiring consideration by the panchayats. Even if the right of appeal is exercised it is the decision of the Government which ultimately prevails under section 157 (5). It does not however mean that when the Government exercise its powers under section 157 (3), it can exercise it in a manner inconsistent with the basic scheme of the Act.

S. Mohankumaramangalam for *T. Martin*, for Petitioner.

The Additional Government Pleader on behalf of 1 and 2 Respondents.

S. Mohan for *K. Venkataswami K. Alagiriswami* and *D. Raju*, for Respondents 3 to 25.

V.S. ——— *Petition dismissed.*

Ramakrishnan, J.
11th February, 1965.

The Management of Kolukkumalai Tea Estate of Kottagudi Plantations Private Ltd. *v.* Their Workmen.
W. P. No. 218 of 1963.

Industrial Disputes Act (XIV of 1947)—Misconduct of workmen—Domestic enquiry—Witness for Management—Copies of statement—Witness examined fully in the enquiry—Failure to supply copies in advance—Not a vitiating factor—Failure of Labour Court to decide a material point.

The rule about the supply of copies of the statement of witnesses for the management in advance of the enquiry is not a rigid one to be mechanically applied in all cases. Where witnesses themselves are examined fully by the management, in the domestic enquiry, the failure to furnish advance copies of the statement will not vitiate the enquiry. Where the Labour Court has not adverted to or given a decision on the real point requiring decision for holding that the enquiry conducted by the domestic Tribunal was vitiated through failure to comply with the rule of natural justice, the order of the Labour Court has to be quashed.

V. Thyagarajan and *M. Ramachandran*, for Petitioner.

S. Ramaswamy, for 1st Respondent.

V.S. ——— *Petition allowed.*

Ramamurti, J.
27th February, 1965.

K. Ramaswamy *v.* State of Madras.
W.P. No. 1984 of 1964.

Madras Cattle Diseases Act (II of 1866), section 18—Bye-law framed under—Empowering temporary closure of public or private cattle market—Petitioner having right to collect fees in respect of animals brought to the market—Validity of the bye-law—No infringement of fundamental rights.

The Madras Cattle Diseases Act is concerned with the prevention of the spread of diseases and the ultimate object obviously is to preserve the cattle wealth of the country and of the State. The statute merely enumerates the directions which can be issued or steps which can be taken with regard to the diseased animals but this does not mean that the Government cannot make bye-law concerning healthy animals even if such a step would effectively prevent the spreading of cattle disease. The bye-law empowering the closure, temporarily, of public or private cattle markets whenever it is considered necessary in order to prevent the spread of contagious or infectious diseases among animals is not unreasonable nor is repugnant to the provisions of the Act nor in excess of the powers conferred on the Government.

The right of the petitioner to collect fees in respect of animals brought for sale at the market is a right, subject to the condition of closure of the market under

certain circumstances. No question of infringement of any fundamental right arises.

V. V. Raghavan, for Petitioner.

S. Mohan for the Additional Government Pleader on behalf of Respondent.

V.S. ——— *Petition dismissed.*

Kailasam, J.
3rd March, 1965.

In re, Shahool Hammeed.
Crl.A.No. 905 of 1962 and
Crl.R.C.No. 361 of 1963.

Penal Code (XLV of 1860), section 304-A and Madras Motor Vehicles Rules, Rules 39 (2) and 39 (3)—Person with a learner's licence—Driving a motor vehicle without a driver having a permanent licence—Skid on a wet road—Hitting pedestrian and causing death—If a rash and negligent act causing death—Conviction for driving without a driver holding a permanent licence.

The conduct of the accused in driving the vehicle holding only a learner's licence without a qualified driver by his side will be punishable under the Motor Vehicles Act and Rules. But where the evidence on record does not disclose that the skidding of the vehicles causing death was due to any incompetent driving but due to reasons beyond the control of the driver it would not fall within the scope of section 304-A of the Penal Code. The prosecution is bound to prove that the negligent act of the accused was the immediate and proximate cause of the death of the victim for an offence under section 304-A of the Penal Code.

N. Natarajan, for Appellant.

K. A. Panchapakesan, for the Public Prosecutor on behalf of the State.

V.S. ——— *Ordered accordingly.*

Kailasam, J.
15th March, 1965.

S. Rangaswamy *v.* R. Narayanan.
Crl.M.P.No. ... of 1965
S.R. No. 7916 of 1965 in
Crl.R.C. No. 476 of 1964.

Criminal Procedure Code (V of 1898), sections 369, 561-A—Court not to alter judgment—Inherent power of High Court—If includes power to review.

Section 561-A of the Criminal Procedure Code does not in any way enlarge the powers under the Code, especially when it is provided in the Code that no Court when it has signed the judgment, shall alter or review the same.

George Alaxander, for Petitioner.

R. Srinivasan, for Respondent.

S. R. Srinivasan, for the Public Prosecutor on behalf of the State.

V.S. ——— *Petition dismissed.*

Srinivasan, J.
16th March, 1965.

AL. Vaithilingam *v.* Iravatheeswara Soundaranayagi Amman Temple.
W.P. Nos. 693 of 1962 and
109 & 110 of 1965.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 15 (2)—Appeal to the Tribunal against the order of the Settlement Officer—Power of the Tribunal to extend time for filing appeal—Applicability of section 5 of the Limitation Act (IX of 1908).

By virtue of the rules framed in 1950 the provisions of section 5 of the Limitation Act were made applicable to all proceedings under the Abolition Act before the Tribunals having jurisdiction under the Abolition Act. It was persumably not the intention of the Legislature when it amended section 15 (2) (*a*) of the Act in 1954, to render this rule nugatory for by a subsequent Government order issued

in 1957, the Government did in fact amend this rule and make the provisions of section 5 of the Limitation Act inapplicable to certain other proceedings under sections 10 (3) and 51 (1) of the Abolition Act. If this part of the rule which was put in 1957 only made section 5 inapplicable to certain specific proceedings, on a reading of the rule as a whole, the inference should necessarily follow that the rule, though framed in 1950 continued in force and will be applicable to all other proceedings contemplated. It would certainly apply to such proceedings as the one covered by section 15 (2) of the Act. The Tribunal has jurisdiction to act under section 5 of the Limitation Act to excuse the delay in filing the appeal.

K. Venkataswami, for Petitioner.

N. Ramachandran, N. Sivamani and *M. V. Krishnan* for 1st Respondent.

The Additional Government Pleader on behalf of 3rd Respondent.

V.S. ——— *Petition dismissed.*

Ramakrishnan, J.
18*th March*, 1965.

Dhanaraj, *In re.*
Crl.R.C.No. 1949 of 1964.
Crl.R.P.No. 1818 of 1964.

Penal Code (*XLV of* 1860), *section* 196, *Criminal Procedure Code* (*V of* 1898), *sections* 4 (1) (h), 190 (1) (b), 195—*Obstruction to Head Constable in discharge of official duty—Sub-Inspector of police filing a petty-case charge-sheet under section* 186 *of the Penal Code seeking sanction to prosecute—Cognizance—Complaint, not excluded as a police report under section* 190 (1) (b) *of the Criminal Procedure Code.*

The report of the Police Officer excluded from the definition of 'complaint' in section 4 (1) (*h*) of the Criminal Procedure Code is not every kind of report by a Police Officer, but a report by a Police Officer after investigation in accordance with Chapter XIV of the Criminal Procedure Code and sent by him whether under section 170 (1) when he has gathered sufficient evidence or, under section 173 of the Criminal Procedure Code at the conclusion of his investigation sent to the Court empowered to take cognizance of the offence. The petty-case charge-sheet filed by the Sub-Inspector under section 186 of the Penal Code will not amount to a police report and cognizance can be validly taken.

P. R. Gokulakrishnan, for Petitioner.

K. A. Panchapakesan, for Public Prosecutor.

V.S. ——— *Petition dismissed.*

Veeraswami and
Kunhamed Kutti, JJ.
19*th March*, 1965.

M. Karunanidhi *v.* M. Raman.
W.P. No. 800 of 1965.

Defence of India Rules, 1962, *Rule* 30 (1) (*b*), *Constitution of India* (1950), *Articles* 226, 359 (1), 363, *Code of Criminal Procedure* (*V of* 1898), *Section* 491-*A*—*Presidential Proclamation of Emergency—Order of detention—Relief in enforcement of specified fundamental rights and under section* 491-A *of Criminal Procedure Code, barred—Validity of detention open to question on other pleas—Strict proof of* mala fide *necessary—Detention not confined to activities in relation only to external aggression—Satisfaction for the detention to be by the specified authority—Propriety or otherwise of the satisfaction—No power of review in the Court.*

Any claim or relief involving in substance a determination or enforcement of the specified fundamanetal rights cannot be considered and granted by Courts, be it under Article 32 or 226 of the Constitution or section 491 (1) (*b*) of the Code of Criminal Procedure and is hit and covered by the ban under the Presidential Order. Any relief or claim on pleas like a detention being in violation of the mandatory provisions of the Defence of India Act or being made *mala fide* or under a provision of law which suffers from the vice of excessive delegation are not affected by the ban.

The plea, that the detention is *mala fide* has to be proved strictly. The allegation of *mala fides* based on personal and private motives of an official act has to be proved like any other fact in issue and only on the basis of materials which clearly bear out such personal and private motive and not something which in the ultimate analysis is no more than an assumption or apprehension.

The proclamation extends to all aspects of the security of India, not merely from the standpoint of external aggression, but also internal disturbances which will cover public safety, maintenance of public order and all peaceful conditions in any part of the area in India.

Whether the power of detention is to be exercised under the Preventive Detention Act or the Defence of India Act will depend on the facts and circumstances of each case and it is for the specified authority to decide the question. The choice so made cannot by itself furnish the basis for an allegation that the order of detention is *mala fide*.

The satisfaction for the order of detention must be of the authority specified arrived at after reasonable and careful consideration of relevant matters pertaining to the necessity of detention of an individual. Once the satisfaction is expressed to have been reached by the proper authority it is not open to judicial scrutiny with reference to objective tests, standards or considerations.

K. Narayanaswami Mudaliar, for Petitioner.

The Advocate-General (*N. Krishnaswamy Reddiar*) and the Public Prosecutor (*V. P. Raman*) on behalf of Respondent.

V.S. ——— *Petition dismissed.*

Srinivasan, J.
22nd March, 1965.

Mohammed Nainar Pallivasal, *v.* The R.D.O., Tirunelveli.
W.P. No. 1627 of 1964.

Land Acquisition Act (I of 1894)—Jurisdiction of the 'Civil Court' in reference proceedings under the Act—No power to set aside the award—Order setting aside award a nullity.

Under the scheme of the Land Acquisition Act the Court to which reference was made under the Land Acquisition Act being an appointed or a designated Court with powers circumscribed by the Act itself it is not open to it to examine whether the award is invalid for any reason whatsoever. The Court acting within the ambit of the Act in proceedings that were referred to it under certain specified provisions cannot declare an award to be invalid and set it aside. If the Court did not have any such jurisdiction, such an order setting aside the award in proceedings under the Act, would be a nullity and be of no effect.

S. K. Ahmed Meeran and *K. Khaja Mohideen*, for Petitioner.

The Additional Government Pleader on behalf of 1st Respondent.

M. M. Ismail and *N. A. Sathar Sayed*, for 2nd Respondent.

V.S. ——— *Petition dismissed.*

Ramakrishnan, J.
25th March, 1965.

Ramiah Archakar *v.* V. Ramabadriah.
Crl.R.C.No. 1776 of 1964.
Crl.R.P.No. 1747 of 1964.

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 101—*Function of the Magistrate in ordering recovery of properties to the Trustees—Archaka, a servant of the temple in possession of temple property—Party to proceedings before the Deputy Commissioner—"Otherwise not entitled to be in possession"—No title to possession independent of the title put forward in proceedings before the Deputy Commissioner.*

Under section 101 of Madras Act XXII of 1959 a Magistrate in directing recovery of the temple properties to the trustees has to decide if the claim of a person claiming in good faith to be in possession on his own account and not on account

of some person who was trustee, office holder or servant of the temple is valid. If the person who is resisting the delivery of possession before the Magistrate has been a party to the proceedings before the Deputy Commissioner for the issue of the certificate and if the finding is that properties belonged to the temple, that finding will be conclusive evidence before the Magistrate in regard to question whether the property was a temple's property. An Archaka of a temple is a servant of the religious institution and such archaka who did not set up before the Magistrate a claim to possession independent of the title which he had put forward in the proceedings before the Deputy Commissioner and which was found against him would be a person "otherwise not entitled to be in possession." The Order of the Magistrate, taking note of all these facts and directing delivery is unimpeachable in the circumstances.

M. A. Sathar Syed and *A. Ramanathan*, for Petitioner.

C. Harikrishnan, for Respondent.

K. A. Panchapakesan, for the Public Prosecutor on behalf of the State.

V.S. ——— *Petition dismissed.*

Srinivasan, J.
26th March, 1965.

G. P. Rangaswamy *v.* S. V. Viswanathan
W. P. No. 2118 of 1964.

Madras District Municipalities Act (V of 1920), *Sections* 44, 47—*Inclusion of name of voter in the electoral rolls—Finality—Election Tribunal—No jurisdiction to investigate age of such person and set aside election as materially affected.*

The Election Tribunal under the District Municipalities Act has no jurisdiction to embark on the investigation of the age of a person whose name stood included in the Electoral Roll for the elections to the Municipality. The conclusion which the Tribunal reached that the result of election was materially affected as a result of such investigation of an age of person is not sustainable in law.

M. M. Ismail, for Petitioner.

N. Sivamani, for Respondent.

V.S. ——— *Petition allowed.*

Veeraswami, J.
26th March, 1965.

M/s. N. K. Annamalai Chettiar & Co. *v.*
The Deputy Commercial Tax Officer.
W.P. Nos. 1217 and 1218 of 1965.

Madras General Sales Tax Act (I of 1959), *section* 41—*Order of assessment based on documents or accounts seized illegally — Assessments, if rendered illegal.*

The assessment orders under the Act will not be vitiated merely because the account books or other records seized illegally were relied on in support of them. It is one thing to say that search and seizure of documents and account books is illegal and it is quite another that because of that, documents so seized cannot legally be used as evidence. Whatever means by which documents have been obtained, their admissibility will depend only on their relevancy and not on the means by which they have been procured.

K. Srinivasan and *K. C. Rajappa*, for Petitioner.

V.S. ——— *Petition dismissed.*

Ramamurthi, J.
5th April, 1965.

Francis, *In re*
Crl.R.C. No.1760 of 1964.
Crl.R.P.No. 1731 of 1964.

Madras Prohibition Act (X of 1937), *section* 4-*A*—*Person found in a state of intoxication—Evidence in defence of consumption of a medical prescription containing tincture zengiberis—Burden of proof.*

The proper scope of section 4-A of the Madras Prohibition Act will have to be determined with reference to the object and purpose of the enactment as

indicated in its Preamble, which, amongst other things is the prohibition of consumption of intoxicating liquors. Though the section merely states, 'whoever is found in a state of intoxication' without any qualification, a mere state of intoxication by itself would not be sufficient, but it must be proved that he had consumed a prohibited liquor. Where it is not possible to rule out a theory that the state of intoxication in which the petitioner was found was due to his consumption in excessive quantity of the mixture containing tincture zezigiberis prescribed by the doctor, that it was not solely due to consumption of prohibited liquor or alcohol, the circumstances clearly raise a genuine doubt about the guilt of the petitioner.

N. Natarajan, for Petitioner.

S. R. Srinivasan, for Public Prosecutor.

V.S. *Petition allowed.*

Kunhamed Kutti, J.
5*th April*, 1965.

T. Karikala Gounder, *In re.*
Crl.A. No. 708 of 1963.

Motor Vehicles Act (*IV of* 1939), *sections* 2 (7), 2 (35), 72, 124, *and Madras Motor Vehicles Rules—Rules* 262, 215-*B—Offence of overloading—Weighment of goods as well as the person in the vehicle—Inclusion of living persons, not justified.*

Having regard to the definition of "goods" in section 2 (7) of the Motor Vehicles Act and the definition of 'weight' in section 2 (35) of the Act, and construing the provisions of the Act keeping in view the purpose or context without doing violence to the provisions in considering the question whether the motor vehicle was overloaded, the weight of goods carried in the vehicle, would not include weight of living persons. But under section 72 (3) (*b*) read with section 124 the accused would be guilty of carrying more persons than allowed under the permit issued to him.

K. Thirumalai and *S. Parthasarathy*, for Appellant.

K. A. Panchapakesan, for the Public Prosecutor on behalf of the State.

V.S. *Ordered accordingly.*

Kunhamed Kutti, J.
8*th April*, 1965.

A. Sambandam *v.* C. Natesan.
Crl.R.C.No. 428 of 1964,
Crl.R.P. No. 419 of 1965 and
Crl.M.P. No. 545 of 1965.

Criminal Procedure Code (*V of* 1898), *sections* 435, 429, 215—*Offence of adultery—Husband in Malaya—Inability to proceed to India to file a complaint—Not a ground for empowering an agent to file complaint—Complaint incompetent.*

Under section 199 of the Criminal Procedure Code no Court shall take cognisance of an offence under section 497 or 498 of the Penal Code except upon the complaint made by the husband of the woman or in his absence made with leave of the Court by some person who had care of such woman on his behalf at the time when such offence of adultery was committed. The fact that the husband was in Malaya and unable to proceed to India to file a complaint will not be sufficient to authorise the power of attorney agent to file the complaint. Such a complaint would be incompetent and has to be quashed.

G. Gopalaswami, for Petitioner.

M. P. Sundararajan, for Respondent.

S. R. Srinivasan, for Public Prosecutor on behalf of the State.

V.S. *Petitions allowed.*

Veeraswami, J.
9th April, 1965.

M. Varadarajulu Naidu *v.* State of Madras.
W.P. Nos. 865 and 884 of 1963, 774 of 1964 and 1280 of 1965.

Madras General Sales Tax Act (*I of* 1959), *Schedule II*, *Entry* 1—'*Cinder*'—*Not coke or form of coke—Not entitled to benefit of single point tax.*

Cinder is not coke or is not a form of coke and does not fall within the Entry 1 of Schedule II of Madras General Sales-Tax Act of 1959, and it is not entitled to the benefit of single point tax.

R. S. Venkatachari, for Petitioner.

The Special Government Pleader for the Respondents.

V.S. *Petition dismissed.*

Kunhamed Kutty, J.
9th April, 1965.

Public Prosecutor *v.* Bismillah Khan.
Crl. Appeal No. 833 of 1963.

Constitution of India (1950), *Article* 5—*Right of citizenship—Domicile, in India for* 30 *years—Proceeding under Registration of Foreigners Act and Rules—Not to affect citizenship—Finding in a prior case that accused is not a foreigner—Rule of* '*issue estoppel*'*—Precludes evidence to prove the same fact.*

Under the Article 5 of the Constitution two conditions are necessary to acquire citizenship, (1) domicile in the territory of India, (2) birth in the territory of India of the person concerned or of either of his parents or his residence ordinarily for not less than five years immediately preceding the Constitution. The word 'domicile' implies an element of permanence and means the place where one lives in opposition to the place where one only remains for a time. Where a person has proved his domicile in India and his continued residence prior to the Constitution and his marital alliance he will become a citizen of India. The several proceedings taken against him treating him as a foreigner under the Registration of Foreigners Act and Rules, will not affect his right as a citizen of India. Where the accused was found to be not a foreigner in prior proceedings the rule of "issue estoppel" in a criminal case would apply to exclude evidence of the same fact in latter case. This rule is not the same as the plea of double jeopardy or autrefois acquit. The rule relates to the admissibility of the evidence which is designed to upset the finding of fact recorded by the competent Court at a previous trial.

S. R. Srinivasan, for Public Prosecutor on behalf of the State.

G. Gopalaswami, for Respondent.

V. S. *Appeal dismissed.*

Srinivasan, J.
14th April, 1965.

U. Vridhachalam *v.* State of Madras.
W.P. No. 863 of 1961.

Constitution of India (1950), *Article* 226—*Dismissal of petitioner on departmental enquiry—Writ of* certiorari—*Death of petitioner—Legal representative, not entitled to continue the writ.*

Where the issue of a writ was sought only to quash the order of dismissal and restoration of the petitioner to his rights in the service of the State, it is only a personal right of the petitioner, that is sought to be ventilated and therefore if the petitioner is no longer alive to avail himself of the benefits of the remedy, the legal representative of the petitioner cannot continue the writ.

S. Mohan, for Petitioner.

K. S. Bakthavatsalam for the Additional Government Pleader on behalf of Respondent.

V.S. *Petition dismissed.*

Kunhamed Kutti, J.
14th April, 1965.

Ramiah Velar *v.* Govinda Velar.
Crl. Appeal Nos. 620 and 621 of 1963.

Madras Panchayats Act (XXXV of 1958), *section* 161 (1) (2)—*Encroachment on the poramboke vested in the panchayat—Notice to vacate and prosecution for non-compliance—Executive Authority or the President, competent to issue notice and to prosecute—Penal Code* (*XLV of* 1898), *section* 447—*Criminal trespass in the poramboke vested in the panchayat—' Intent to commit an offence or annoy the Panchayat Board—' Annoyance '—Absence of intention—No offence made out.*

Under section 161 (1) and (2), the Executive Authority or the President of the panchayat is competent to issue a notice to vacate the encroachment made on the poramboke lands vested in the panchayat and to prosecute for non-compliance of such a notice.

When the respondent proceeds upon the poramboke lands in question it cannot be said that they intended to commit any offence, or had any intention to intimidate or insult any person in possession, which in this case is the Panchayat Board. The word 'annoy' may imply an element of hatred, and it is impossible to attribute to the respondents such intention. But in law " annoyance includes hurt done to a place, public or private by placing anything thereon or by encroachment or such like means." In the absence of an element of intention for the offence, no offence under section 447 of Penal Code can be said to have been made out.

K. Chandramouli for *T. R. Ramachandran*, for Appellant.

M. Srinivasagopalan, for Accused.

K. A. Panchapakesan, for Public Prosecutor on behalf of the State.

V.S. *Ordered accordingly.*

Srinivasan, J.
15th April, 1965.

The Chidambaram Provision Stores *v.* The Chief Controller of Imports and Exports, New Delhi.
W.P. Nos. 1493 and 1494 of 1963.

Imports and Exports Control Act (XVIII of 1948)—Red Book (for the licencing period) Paragraph 76—Notifying change in the constitution of the firm and application for import licence for a particular period—Recognition of the change subsequent to the period, and refusal of licence on that score—Order erroneous in law.

Assuming that the approval of the Chief Controller of Imports and Exports is necessary before licence was granted, there is no warrant for holding that the rights of the quondam partners could be recognised only on and from the date of approval by the Chief Controller. The material date was the date of the agreement of the petitioners to divide the business and the assets and liabilities of the firm. If the grant of licence was to be effective only from the date of such approval, great deal of inconvenience, hardship and positive harm may result. Departmental delays for which persons doing business are in no way responsible cannot destroy their rights. The order of the Chief Controller refusing licence to the petitioner for the particular period on the ground that recognition of the change in the constitution of the firm was made after the licencing period, is erroneous in law and has to be quashed.

N. Venkatarama Iyer, for Petitioner.

K. S. Bakthavatsalam for the Additional Government Pleader on behalf of Respondents.

V.S. *Petition allowed.*

Ramakrishnan, J. Ethiraju Mudaliar *v.* Pachiappa Gounder.
15*th April*, 1965. Crl. R. C. Nos. 1531 of 1964 and Crl. R. P. No. 1503 of 1964.

Criminal Procedure Code (*V of* 1898) *and Madras Hindu Religious and Charitable Endowments Act* (*XXII of* 1959), *section* 101—*Putting trustees in possession of the religious institution— Existence of joint trustees to take possession as a body—Trustee, not joining in such proceedings—Procedure.*

It is well recognised that trustees of a religious institution function as a corporate body. When such trustees resorted to proceedings under section 101 of the Religious Endowments Act all the trustees should appear as parties in the proceedings and any order to be valid must be passed in favour of all trustees jointly whether they appear on the record as petitioners or as respondents. The former trustees can give valid surrender of possession only if it is made to the body of the duly appointed trustees as a whole. It will be no valid defence to them in proceedings, under section 101 to say that outside the Court they have delivered peaceful possession to one of the trustees. If they had given possession to one of the trustees that person will be only the person who claims to be in possession under the former trustee within the meaning of section 101, and the Court is bound to pass a further order under section 101 for delivering possession in favour of all the trustees as a body, whether they are petitioners or respondents in the proceedings.

R. Sundaralingam, for Petitioner.

T. M. Chinnaiya Pillai, for Respondents.

K. A. Panchapakesan, for Public Prosecutor on behalf of the State.

V.S. ——— *Ordered accordingly.*

Veeraswami, J. Jana Devi *v.* State of Madras.
19*th April*, 1965. W.P. No. 1576 of 1964.

Motor Vehicles Act (*IV of* 1938), *Madras Motor Vehicles Rules*, 85—*Motor Vehicle—Hire purchase agreement—Default—Possession of vehicle taken back—Application to the Deputy Commissioner for the issue of duplicate certificate of registration—Jurisdiction of Deputy Commissioner—Writ of* mandamus.

It is the duty of the Deputy Commissioner to satisfy himself as to whether the petitioner had taken possession of the vehicle owing to the default of the owner under the provisions of the hire purchase agreement and the owner had refused to deliver the certificate of registration. He cannot put aside the matter merely observing that it is a civil dispute. He must apply his mind and in so doing he may come to any conclusion, namely, whether he is satisfied or not, on the materials placed before him.

K. Hariharan, for Petitioner.

K. Venkataswami, for the Additional Government Pleader.

V.S. ——— *Petition dismissed.*

Ramakrishnan, J. John, *In re*
19*th April*, 1965. Crl. A. No. 893 of 1963.

Suppression of Immoral Traffic in Women and Girls Act (*IV of* 1956), *sections* 3 (1) *and* 4 (1)—*Isolated instance of a woman having sexual intercourse with another in her house procured by her servant—No offence of running a brothel—Section* 4 (1)—*Living on the earnings of prostitution—Servant paid for procuring person for the act charged under section* 3 (1), *if can be punished under section* 4 (1).

The definition of " brothel " under Suppression of Immoral Traffic Act implies that the premises must have been used for the purpose of prostitution for the gain of another person or for the mutual gain of two or more persons. The

term will not apply where one woman receives a number of men. In the absence of evidence that two prostitues having worked for their mutual gain in the premises and in the absence of evidence that the prostitution of the accused was for the gain of her husband, there cannot be a conviction for the offence under section 3, that the premises in question was used as a brothel. But the servant of the woman procuring a person for the purpose of prostitution for money, though charged under section 3 (1) of the Act can be convicted under section 4 (1) of the Act for living on the earning of the prostitution.

T. M. Kasturi and *Natarajan of M/s. Jain and San* for Accused 1 and 2.

K. Rangarajulu, for Accused 3.

K. A. Panchapakesan, for Public Prosecutor on behalf of the State.

V.S. *Ordered accordingly.*

M/s. Sha Maggajee Saremall & Bros. *v.* The Joint Chief Controller of Imports and Exports.

Srinivasan, J.
23rd *April*, 1965.

W.P. Nos. 566, 600 and 602 of 1962.

Imports and Exports Control Act (XVIII of 1947)—Change in the constitution of firm—Licence for a particular period—To be issued though recognition of change was subsequent to the period—Prohibition of the import for a latter period—Not to affect the grant of licence for the particular period—Hindu undivided family firm—Death of one member—Fact to be notified in application for licence—Jurisdiction to refuse licence in case of suppression.

It is settled law that where a transfer of quota rights is effected as a result of change in the constitution of the firm, the newly constituted firm becomes entitled to the transferred quota as from the date on which the constitution is effected and not from the date on which the Chief Controller of Imports purports to accord recognition to such reconstitution. Notwithstanding that the recognition is accorded at a subsequent date, established importer cannot be denied the licence for the period before such recognition for which a valid application has been made.

What the import policy lays down is only whether during that period for which the policy is enunciated licenses for the import of the several items should be permitted or not and if permitted, to what extent. It would not be correct to describe the Import Policy Book as enacting a ban on imports during that period. It is not open to the import authorities to rely upon the policy relevant to the latter in dealing with the application for an earlier period.

The application for the grant of licence may be refused where the application contains false, fraudulent or misleading statement. Where the Hindu undivided family constituted themselves into a firm for the purpose of business and if one member dies, there is a change in the constitution of the firm and that fact should be intimated to the Controller.

B. R. Dolia, for Petitioner.

The Additional Government Pleader on behalf of Respondent.

V.S. *Petition allowed.*

Kunhamed Kutti, J.
23rd *April*, 1965.

Corporation of Madras *v.* Arumugham.
Crl. A. No. 930 of 1963.

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 7 and 16, 20, *and Rules* 44 (*c*) *and* 46 *of Rules of* 1955—*Adulteration of ghee—Reichert value of* 22.5 *per cent—Analyst's certificate—Adulteration of* 13 *per cent extraneous fat—Proof of adulteration—Food Inspector authorised to institute prosecutions—General authority—Complaint filed under sections* 7, 16 *and Rule* 44 (*c*) *and* 46 *or under* 44 (6)—*Want of specific sanction for contravention of items in terms—Prosecution not affected.*

Act XXXVII of 1954 defines what ghee is and what adulteration of ghee is and when the rules say that any deficiency in the Reichert value below a particular stipulated figure means a substandard quality and such substandard quality is by definition of Act an adulteration, it will not be open to Court to

investigate about a Reichert value and its bearing upon the qauantum of fat in different areas in the country.

The Food Inspector authorised under section 20 (1) of the Act would act in relation to all prosecutions under the Act and not in relation to a specific or a particular case. When, a complaint is filed under sections 7 and 16 of the Act read with rule 44 (*c*) and 46 or with rule 44 (*b*), the sanctioning authority must be deemed to have exercised his mind in considering the Analyst's report the elements constituting the offence. Any want of specific sanction for contravention of the items in terms defined in Appendix B would not affect the prosecution.

T. A. Ramaswami Reddy, for Appellant.

R. Srinivasan, for Respondent and *B. Sriramulu*, for Public Prosecutor.

V.S. ——— *Acquittal set aside.*

Kunhamed Kutti, J.
23*rd April*, 1965.

Corporation of Madras *v.*
Elumalai Pillai.
C.A. No. 934 of 1963.

Prevention of Food Adulteration Act (*XXXVII of* 1954), *sections* 7 *and* 16, 10 (7)—*Adulteration of milk—Taking signature of two witnesses at the time of seizure of sample, "as far as possible"—Procedure—Tests of adulteration—Freezing point test—Fair and safe method of determining added water.*

The expression "as far as possible" in section 10 (7) of Act XXXVII of 1954 is intended to obviate the necessity of the presence of two persons and securing their signature if circumstances under which he takes the sample were such that there cannot possibly be two persons present at the time. The present case was not one where witnesses had not been requisitioned but where the testifying witnesses have not fully supported the prosecution case and therefore the question was one of appreciation of their evidence in the light of the evidence of the Food Inspector and not a case for the application of the rule relating to securing the signature of two persons "as far as possible" laid down in section 10 (7). In determining the amount of added water in milk the freezing point test is the fair and safe method. Since the test has not been attempted in the present case, the order of the acquittal has to be upheld.

T. A. Ramaswami Reddi, for Appellant.

A. Krishna Rao, for Respondent.

K. A. Panchapakesan, for Public Prosecutor on behalf of the State.

V.S. ——— *Appeal dismissed.*

Srinivasan, J.
26*th April*, 1965.

E. K. Pattabirama Reddiar *v.*
The Special Deputy Collector for Land
Acquisition, Madras.
W.P. No. 322 of 1963.

Land Acquisition Act (*I of* 1894), *section* 17 (1), (4) and (5) (4)—*Arable land—Lands on which thopes of fruit-bearing trees have been raised—Applicability—Dispensing with enquiry under section* 5-A.

Under section 17 (1) of the Act, the land upon which fruit-bearing trees have been exclusively raised will still be arable land. Arable land is that which has been or may be cultivated. It is not unusual to have cultivation in the open spaces between trees even in a thope, to say therefore, that a land upon which trees stand is not arable or cultivable land does not appear to accord with any sense of the term.

It is not necessary to make specific mention whether the urgency clause under section 17 (1) or section 17 (2) is being invoked. What is necessary is that the appropriate authority should have applied its mind and express the need for taking action under section 17 (4).

S. Venkatarama Iyer and *E. R. Krishnan*, for Petitioner.

Special Government Pleader on behalf of Respondents.

V.S. ——— *Petition dismissed.*

Ramakrishnan, J.
11*th February*, 1965.

Meera Mohideen *v.*
Sahabuddin.
S.A. No. 452 of 1963.

Benami—Husband buying property in the name of wife—Unexplained by other proved or admitted facts—No theory of advancement.

Where a husband purchases property in the name of his wife, it is to be regarded as a benami transaction, if the transaction remained unexplained by other proved or admitted facts. These facts may include the surrounding circumstances, and the probable causes likely to have operated on the mind of the parties in bringing about the transaction, and these surrounding circumstances and probabilities might show that the husband in a particular case got the document executed in the name of his wife with the object that the property should belong to her.

S. K. Ahmedmeeran and *M. Khaja Mohideen*, for Appellant.

K. Sarvabhauman and *T. R. Mani*, for Respondent.

V.S.

Appeal dismissed.
Leave granted.

Ramakrishnan and
Ramamurti, JJ.
16*th February*, 1965.

Chinnamerkathian *alias* Muthu-
Gounder *v.*
Ayyavoo *alias* Perianna Gounder.

C.R.P. Nos. 2399, 2400 and 2401 of 1961.

Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 3 (4) (*a*)—*Petition for eviction by purchaser on ground of default in payment of rent for the period prior to his purchase—Maintainable—Composite order of Revenue Court directing payment of arrears within specified date and in default, eviction to follow—Composite order, not illegal—Extension of time for paying arrears—Application made before the expiry of the original time granted or thereafter—Can be granted but is in the discretion of the Revenue Divisional Officer—Order directing tenant to pay the landlord the arrears instead of deposit—Not an invalid order.*

A purchaser of the lands is entitled to evict the tenant under the Cultivating Tenants Protection Act on the ground of default in the payment of a rent for the period prior to his purchase.

Even after the expiry of the period fixed by the Revenue Divisional Officer, granting time to the tenant to pay or deposit the arrears of rent, the Officer would have power to extend the time for payment of the arrears. An application for extension of time by a tenant after the expiry of the time fixed could not be granted as a matter of course. The power lies in the discretion of the Officer, but the discretion should not be exercised in an arbitrary or capricious manner but should be moderated by the particular facts of each case.

The composite order fixing the date for payment of arrear and in default eviction to follow is not an illegal order. The direction to pay the arrears of rent to the landlord instead of directing him to deposit the same is also legal.

Kandan v. *Arumugha Mudaliar*, (1963) 1 M.L.J. 182, *Chinnayan* v. *Nagarathinam*, (1964) 1 M.L.J. 389, *Lakshmanan* v. *Sambandam Pillai*, (1958) 1 M.L.J. 26 and *Muthukumara* v. *Sambandam Pillai*, (1960) 1 M.L.J. 20, overruled.

T. K. Subramania Pillai, for Petitioner.

V. Vedantachari and *A. Venkatesan*, for Respondent.

V.S. *Petition dismissed.*

M—N R C

Abdul Ravood Sahib *v.*
M. Kannappan.
C.R.P. No. 484 of 1964.

Ramamurti, J.
23rd *February*, 1965.

Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 4 (5)—*Petition or restoration by tenant dispossessed after the Act—Subsequent lessees, need not be impleaded as parties to the petition—Derivative title would be bound by an order of restoration against the landlord—Enforcement of order of eviction—Powers of Revenue Divisional Officer.*

The necessity for giving notice in restoration proceedings under the Cultivating Tenants Protection Act to a person inducted into the land by the landlord subsequent to the dispossession of a prior cultivating tenant would not apply where the dispossession had taken place after the commencement of the Act. The order of restoration passed against the landlord would be binding on persons holding under him. The crucial test to determine is whether the person in possession who has not been impleaded as a party in the proceedings in the restoration has a superior right to remain in possession overriding the right of the prior cultivating tenant.

The Revenue Inspector, while functioning under rule 10, acts as the delegate of the Revenue Divisional Officer and when disputes arise in enforcing his order, the Revenue Divisional Officer himself can and must decide the dispute in the same way as a civil Court would do, while executing the decree for possession. The Officer will undoubtedly have a power and jurisdiction to pass auxillary orders which may be necessary to enforce and implement his original order for eviction and make it as efficacious as necessary. The fact that there is no specific provision does not matter.

Need to amend the Act by providing suitable machinery for effective enforcement of the order for eviction pointed out.

K. S. Naidu and *A. Venkatachalam*, for Petitioner.
V. V. Raghavan and *T. S. Subramanyan*, for Respondent.
V.S. *Petition dismissed.*

Shri Ramakrishnan Srikrishnan
Jheaver *v.*
The Commissioner of Commercial
Taxes, Board of Revenue,
Madras.
W.P. Nos. 1321, 1436, 1495, 1496 and 1553
of 1964, and C.M.P. Nos. 8724, 7593,
8726, 8937, 8995 and 8725 of 1964.

Veeraswami and
Kunhamed Kutti, JJ.
25th *February*, 1965.

Madras General Sales Tax Act (*I of* 1959), *section* 41 (2), (3), (4)—*Constitution of India* (1950), *Article* 19 (1) (*f*) (*g*), (5) *and Entry No.* 54, *List II, Schedule VII*, *Criminal Procedure Code* (*V of* 1898)—*Search and seizure under the Sales Tax Act—Extent of the power; no power to search enacted in section* 41(2) *of the Act—Legislative competence and constitutional validity—Searches and seizure—Provisions of the Criminal Procedure Code—Extent of—Applicability.*

Constitution of India (1950)—*Legislative Entries in the Lists—Wide construction to be adopted—Entry No.* 54, *List II, Schedule VII—Taxes on sale and purchases of goods—Search falls within the Entry—Seizure and confiscation outside the Entry—Search, seizure and confiscation—Right to carry on business—Investiture of unrestricted, arbitrary and unguided power on all officials—Restrictions not reasonable—Infringement of fundamental right.*

Interpretation of Statutes—Proviso to main enacting part—Scope of a proviso—Excepts and cuts out and qualifies the provisions of main part—No function to enlarge.

Words and Phrases—'Inspect'—'Search'—'Seizure.'

The Sales Tax Authority, on specific information that a suit-case containing secret account books relating to various business in which a businessman was interested, was hidden in the business premises of the petitioner-company, searched the premises of the company and forcibly removed it. The Department also entered the residence of an employee of the company and searched and removed books, papers, memorandum etc. In another instance the Department searched

the business premises of a firm and also the residence of the Managing Director under a search warrant. From his residence goods were seized and the assessee was sent a notice of confiscation of the goods and giving him a chance to pay the penalty and compensation in lieu of confiscation. The various assessees filed petitions under Article 226 of the Constitution to quash the orders of the Department, to return the articles seized and to quash the search warrant, on the contention that section 41 of the Act does not empower search of the premises, and seizure of goods and on the assumption that the section empowered search of the premises and seizure it lacked legislative competence, and if the power is said to exist that it violated the fundamental rights guaranteed under Articles 19 (1), 31 (1) and (5) of the Constitution.

Held: Section 41(2) of the Sales Tax Act does not empower search, and section 41(4) in so far as it provides for the power of seizure and confiscation, lacks legislative competence under Entry No. 54, List II, Schedule VII, Constitution and even on the assumption of the legislative competency the provisions are bad as violating Articles 19 (1) (*f*) and (*g*) of the Constitution.

To 'inspect' is to look closely into 'examine officially'. The meaning of 'search' is 'look or feel or go over (person or his face or pockets, receptacle, place, book) for what can be found or to find something of which presence is suspected, probe, look for, seek out.' A search is therefore not mere looking for something which is produced or open but which is hidden, concealed, or not obvious. It is looking for in the sense of seeking out what is suspected or concealed by probing into or investigation or examination. Seize means 'taking possession by warrant or legal right, confiscate, impound or attach, lay hold or forcibly of suddenly, snatch, grasp with hand or mind.' Seizure, therefore, is not mere taking but taking with force.

A mere power of inspection will not therefore take with it a power to seize unlike a search, which often, particularly as seen from the provisions of the Code of Criminal Procedure, includes a power of seizure. A power of seizure need not necessarily imply a power of search, for, there may be seizure on production or on inspection.

Giving the word 'inspection' in sub-section (2) of section 41 of the Act, the ordinary meaning, the sub-section does not include a power of search and is confined to looking into or looking at or examination of all kinds of records, accounts and goods and places which are made available or open for the purpose. The sub-section does not authorise an exploratory probing into or looking for something hidden or concealed with the ancillary or consequential power of seizure. This conclusion is also strengthened by the significance to be attached to the word 'open' in 'shall be open to inspection' in sub-section (2).

The proviso to sub-section (2) does not make any difference to the construction. The proviso undoubtedly proceeds on the assumption that the sub-section includes a power of search without a warrant and provides for an exception that no residential accommodation shall be searched without a warrant. It is on that assumption again the second part of the proviso says that searches under the sub-section shall, as far as may be, be made in accordance with the Code of Criminal Procedure. If the main part does not contain the power, it cannot be obviously imported into it through a proviso.

If, in enacting the proviso, the Legislature assumed such a power in the sub-section which is not there, this erroneous assumption is no law. The result of this construction is that the entire proviso becomes meaningless and otiose.

A proviso is one which excepts, cuts out or qualifies something which will otherwise be within the main part. When the main part is by itself clear as to scope and meaning, a proviso cannot be read as enlarging its ambit. That strictly is the function, scope and effect of a proviso. Nor can the erroneous legislative assumption in proviso have the effect of enacted law.

Under section 5 (2) of the Criminal Procedure Code, the ambit of regulation in special law will decide the extent of applicability or non-applicability of the provisions of the Code.

On the assumption that sub-section (2) of section 41 of the Act includes a power of search, its terms will include the application of sections 96 and 98 of the Code as also the form of warrant prescribed by it. But at the same time, there is nothing in those terms to make sections 101 to 103 of the Code inapplicable to the conduct of search, whether the words 'so far as may be' in the second part of the proviso are read in the narrower or wider sense. But if sub-section (2) is read as search without a warrant quite apart from the legal effect of the proviso, even the issue of search warrant in respect of the proviso will have to be under the provisions of the Code including the form of warrant. Sub-section (3) of the section 41 contains the power of seizure and in the context of the words used therein, it is a power to be exercised without warrant. The sub-section also provides as to how what has been seized should be dealt with. Therefore section 165 of the Code also will not apply to proceedings under sub-section (3) of section 41 of the Act. This applies equally to section 41 (4). In view of the specific provision in sub-section (4) including seizure, it is not within the purview of sub-section (2).

A topic of legislative power enumerated in the Lists in Schedule VII to the Constitution should be read as widely as possible and include all matters incidental, ancillary and necessary to the law made thereunder to be effective. The question of ancillary nature or character of such provisions will have to be decided, with respect to the circumstances, of the particular legislation, its objective and scope, *vis-a-vis* the particular legislative head or topic or power.

The power of search of goods, if included in section 41, will be competent, as one in aid of achieving the purposes of the Act. The presence of goods on a search of a dealer's premises or his residence will be one method of checking the purchases and evasion of the tax.

This power in sub-section (4) relates to seizure and confiscation of goods unaccounted for. The taxable event is the sale or purchase of goods and evasion of tax is not related to goods, though of course search for and presence may, in particular circumstances, be evidence of evasion. But a power of seizure and confiscation of goods is not and cannot be ancillary or incidental to the power to tax the sale or purchase of goods even from the standpoint of checking evasion or making evasion unprofitable. No such law can be made under the guise of Entry 54, List II, of the Seventh Schedule to the Constitution.

The second proviso to sub-section (4) wrongly assumes that the goods not accounted for are taxable under the Act and on that assumption provides that in addition to the tax recoverable a sum of money, not exceeding 1,000 rupees or double the amount of tax recoverable, whichever is greater, shall be compensation is lieu of confiscation. The case under the proviso is not one of the advance tax on provisional assessment and there is no provision for any adjustment at the proper time of the first component of clause (*a*) paid in lieu of confiscation. The first component of clause (*a*) of the second proviso is *ultra vires* the powers of the Legislature under Entry 54, List II, and as it is not severable from the clause, the entirety of clause (*a*) of the second proviso to sub-section (4) must be struck down.

Article 19 (1) (*f*) covers business premises and the kinds of record mentioned in sub-section (2) of the Act. Any invasion of the business premises or search and seizure of records and goods from there will affect the right to hold and dispose of property. The right to hold the property will include the right to enjoy that property without interference or disturbances. Equally when books of accounts or goods in trade are searched for and taken away, it necessarily affects the business, and carrying on the business and also injuriously reflects on the business reputation of the individual concerned.

The investiture of power is of a general character and on all grades of officers who can at their will and whim exercise a power of search and are not obliged to tell or explain to any one higher up in the Tax Department as to why and in what circumstances they happen to exercise the power and the manner of search. Drastic and serious as the power of search is, the exigencies of tax collection do not justify

such a general and unrestricted and direct investiture of powers of search on even the minor officials and such power cannot be regarded by any means as a reasonable restriction. Sub-sections (2) to (4) of section 41 cannot be viewed as reasonable restrictions and they offend Article 19 (1) (*f*) and (*g*) of the Constitution.

V. K. Thiruvenkatachari for *A. R. Ramanathan*, for Petitioner in W.P. No. 1321 of 1964.

V. Srinivasan and *G. Ramaswamy*, for Petitioner in W.P. No. 1456 of 1964.

A. Devanathan and *V. Srinivasan*, for Petitioner in W.P. No. 1495 of 1964.

M. M. Ismail, *A. Ramanathan* and *D. Trilokchand Chopda*, for Petitioner in W.P. No. 1553 of 1964.

The Advocate-General (*N. Krishnaswami Reddiar*) for the Additional Government Pleader on behalf of Respondents in W.P. Nos. 1321 and 1553 of 1964.

The Attorney-General of India (*C. K. Daphtari*) for the Additional Government Pleader and *K. Venkataswami*, on behalf of the Respondents in W.P. Nos. 1456, 1495 and 1496 of 1964.

V.S. ——— *Petitions allowed.*

Anantanarayanan and *Natesam, JJ.*
3rd March, 1965.

G. Vagheesam Pillai *v.*
M. R. Krishnamurthi Padayachi.
A.A.O. No. 49 of 1964.

Representation of the People Act (XLIII of 1951), section 100 (3) (ii) and (iii)—Impersonation of voters—Result of election, if materially affected—Proof of criminal offence in civil proceedings—Burden of proof—Preponderance of probability or proof beyond reasonable doubt—Obligations of the successful candidate.

Where in an election petition, grave averments like the impersonations of a dead or absent voter constituting offences under the Criminal Law are alleged, these facts will have to be proved and it can be accepted upon a preponderance of probability; proof beyond reasonable doubt need not be insisted upon. Further there is certainly a shifting of onus to the opposite party, where the facts are strong enough to justify the inference of clear *prima facie* case. In an election case where the purity of the electoral process is the prime consideration, the successful candidate is not without his obligations and he is bound to lead such evidence as lies in his power.

K. K. Venugopal and *S. Ramalingam*, for Appellant.

K. Narayanaswamy Mudaliar and *V. Krishnamurthy*, for Respondent.

V.S. ——— *Appeal dismissed.*

Ramamurti, J.
8th March, 1965.

Ramachandra Chetty *v.*
Mothaliyandan Chetty.
C.R.P. No. 953 of 1964.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 26, 35—Scope of—Order of eviction passed and confirmed under the old Act—Sub-tenant not impleaded—Revision to High Court—New Act coming into force—Tenant dying pending revision—Subsequent dismissal of the revision petition—Limitation for execution—To run from the date of dismissal of petition and not from the lapse of time for bringing on record the legal representatives of the deceased tenant—Sub-tenant, if can invoke sections 26, 35 of the present Act to resist execution.

The limitation for execution of the order of eviction would commence to run from the date on which the revision was dismissed on merits. It would not begin to run after the expiry of one month after the death of the tenant without his legal representatives having been brought on record.

Having regard to the scheme of the Rent Control Act section 26 read with section 35 (2) (*a*) cannot apply to a situation in which an order for eviction had been passed by the Rent Controller and confirmed by the appellate authority and the revision petition is filed from that order while the old Act was in force. Section 26 must receive a limited application read with section 35 (2) (*a*) only where the scheme of the enactment can be carried out. A sub-tenant not impleaded in the proceedings under the old Act cannot resist the execution filed under the new Act.

Section 26 is merely intended to provide that if the sub-tenant is made a party the order passed in the proceedings will be binding upon him. It does not follow from this that if a sub-tenant is not made a party the order of eviction obtained against the main tenant would not be binding upon the sub-tenant.

N. C. Srinivasan, for Petitioner.

M. A. Srinivasan and *M. A. Srinivasan*, for Respondent.

V.S. ——— *Petition dismissed.*

Natesan, J.
11*th March*, 1965.

Nanda Rao *v.*
Lakshmanaswami Mudaliar.
S.A. No. 1544 of 1963.

Madras Buildings (*Lease and Rent Control*) *Act* (*XVIII of* 1960), *section* 2 (2)—*Lease of cinema theatre along with electrical fittings—If lease of a building within the scope of the Act or a composite lease falling outside the purview of the Act.*

The question for consideration in each case, would be whether what is leased is a theatre building with its normal adjuncts as a building constructed as a theatre, something more than a building—an equipped cinema house.

In the case of a composite lease, where a substantial part of the rent goes in hire of a machinery and plant, the Act cannot apply. What is thereby leased is not a theatre simpliciter, but a running cinema business with all its accessories.

The Act controls and regulates only the letting of buildings and not transfer of business concerns, and running business for periods together with the buildings.

Having regard to the language of the enactment in sections 3, 3 (5), and 4 read with the rule 7 of the Rules the electrical fittings would go with the building as an integral part of the building. Such a building would fall within scope of the Act. The absence of the word 'fittings' in the definition of 'building' is not of much significance.

V. Veeraraghavan and *K. S. Subramanyam*, for Appellant.

V. V. Raghavan and *D. V. Sivagnanam*, for Respondent.

V.S. ——— *Ordered accordingly. No leave.*

Kailasam, J.
15*th March*, 1965.

V. Sevayya Kalingarayar *v.*
N. P. Balasubramoniam.
S.R. No. 11599, 11600 of 1965.

Civil Procedure Code (*V of* 1908), *Order* 43, *rule* 3 (2)—*Appeal from appellate orders—Memorandum to be accompanied by only one certified copy of judgment and decree each of the Court of first instance and appellate Court—Practice.*

Order 43, rule 3 (2), Civil Procedure Code is a separate rule by itself and it requires that memorandum of appeal in an appeal against the appellate order, is to be accompanied by only one certified copy of the judgment and decree each of the Court of first instance and the appellate Court. Order 42 of the Code is applicable only where there is no specific provision in Order 43.

D. Ramaswami Iyengar and *R. Krishnamachari*, for Appellants.

V.S. ——— *Directions accordingly.*

Kailasam, J.
16*th March*, 1965.

Theva Pandian *v.*
Veerappa Chettiar.
A.A.O. No. 177 of 1963.

Civil Procedure Code (*V of* 1908), *section* 11, *Transfer* of *Property Act* (*IV of* 1882), *section* 52—*Final decree in mortgage action—Direction to sell the properties of a particular defendant in the last instance—Acquiescence of the particular defendant in the sale in the first instance and confirmation of sale—Sale of some items by the defendant—Bar of constructive* res judicata *affect the defendant and purchasers as well.*

The final decree in a mortgage action provided that the properties of a particular defendant should only be sold in the last instance but the particular defendant did not object to the sale of some such items in the first instance itself and also the confirmation of such sales in favour of auction purchasers. He also sold some other items to various persons. The defendant who acquiesced in the sale of properties, would be bound by the doctrine of constructive *res judicata* and transferees *pendente lite* will also be bound by the same doctrine.

A. Sundaram Iyer, for Appellant.

Kesava Iyengar and *E. A. Viswanathan*, for Respondent.

V.S. ——— *Appeal dismissed.*

Ramamurti, J.
16*th April*, 1965.

C. M. V. Krishnamachari *v.*
M. D. Dhanalakshmi Ammal.
C.R.P. No. 43 of 1965.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10—*Agreement to sell house by defendant as self-acquisition to third party—Subsequent suit for partition of house against defendant as joint family property—Third party can be impleaded as a party to suit for partition.*

In a suit for partition filed against the defendant of properties including a house that was a subject-matter of a prior agreement of sale entered into by the defendant with a third party on the representation that the house property is his self-acquisition, such third party can be impleaded as a supplemental defendant under Order 1, rule 10 (2) of the Code.

R. Rangachari for *P. Viswanathan*, for Petitioner.

K. N. Balasubramanian for *R. Gopalaswamy Iyengar*, for Respondent.

V.S. ——— *Petition allowed.*

Srinivasan and
Venkatadri, JJ.
29*th April*, 1965.

Mohamed Sayeed *v.*
M. S. Mohamed Jaffar.
S.C.P. No. 210 of 1964.

Constitution of India (1950), *Article* 133, *clause* (1) (*a*) *and* (*c*), *Civil Procedure Code* (*V of* 1908), *sections* 109, 110, *and Order* 45—*Right to joint mutawalliship—Subject-matter of suit and appeal—Relief incapable of valuation—No substantial question of law No leave to appeal to Supreme Court.*

The prayer in the plaint was for declaration that the first respondent was entitled to act as a Mutawalli along with the petitioner. This relief is incapable of valuation. There is also no substantial question of law involved. The petition for leave to appeal to Supreme Court is not competent as it does not satisfy the requirements of Article 133 (1), (*a*), (*b*) and (*c*) of the Constitution.

M. S. Venkatrama Iyer and *M. S. Mohamad Yahya*, for Petitioner.

M. K. Harihara Iyer, for 1st Respondent.

M. M. Ismail, for 2nd Respondent.

V.S. ——— *Petition dismissed.*

Natesan, J. In re, C. R. Subramaniam.
29*th April*, 1965. Crl. Appeal No. 936 of 1963.

Madras City Police Act (*III of* 1888), *sections* 45, 46—*Playing cards for stakes—Place used must be a common gaming house—Profit or gain to the person owning the gaming house—Necessary ingredients of offence—' Gaming '—What constitutes.*

The necessary ingredients for an offence under sections 45 and 46 of the Madras City Police Act is that the place used for gaming should be a common gaming house as defined in the Act. Profit or gain to the person owning occupying etc., whether by way of charge for the instruments of gaming or of the place or otherwise howsoever is necessary and primary element and when that is not established, there can be no offence under section 45 or 46 of the Act.

No doubt when there is a search and seizure, section 43 makes the incriminating articles like cards, table cloths, etc., evidence that the place is used as a common gaming house and that the persons found therein were there for the purpose of gaming. But these evidence in support of the prosecution case are not made conclusive and if there are circumstances and features in the case restricting their value or consistent with the place not being a common gaming house the evidence provided under section 43 will not warrant a finding of guilt.

V. T. Rangaswami Iyengar and *K. Kalyanasundaram*, for Appellants.

B. Sriramulu, for Public Prosecutor on behalf of the State.

V.S. *Appeal allowed.*

Kunhamed Kutti, J. In re, Muniammal.
30*th April*, 1965. Crl. R. C. No. 7 of 1965 and
Crl. R. P. No. 7 of 1965.

Madras Prohibition Act (*X of* 1937), *section* 4 (1) (*a*)—*Identifying contraband liquor by smell—Not proof beyond reasonable doubt—Proof by scientific tests essential.*

Under the Prohibition Act identifying contraband liquor by smell alone is not sufficient and satisfactory proof. It is necessary to obviate all doubts by having contents analysed by scientific test as to the nature of contents beyond any possibility of doubt.

Md. Askar Ali, for Petitioner.

S. R. Srinivasan, for Public Prosecutor on behalf of the State.

V.S. *Petition allowed.*

Ramakrishnan, J.
2nd March, 1965.

Abdul Kareem *v.*
Zuleika Bi.
S.A. No. 302 of 1963.

Mohamedan Law—Gift—Essentials—Gift of property by a distant relation to a minor whose father is alive—Deed of gift if to be handed over—Delivery of possession to and acceptance by guardian—What constitute.

It is not an invariable rule that the handing over of the deed of gift to the donee or where the donee is a minor to the legal guardian of the donee will be an essential requirement for the proof of acceptance of gift.

Where the guardian associated himself closely with the gift and its preparations and allowed the donor to be in possession of the gifted property for the minor for the life of donee and then to the natural guardian this would constitute implied acceptance of the gift by the natural guardian of the minor on his behalf.

The attestation by the tenants of the gifted property not merely to witness the signature of the donor but also to witness the arrangement made under the deed to the effect the dónor would be in possession of the property for and on behalf of the minor for the life time of the donor and after the life time the father of the guardian to be in possession of the same and the attornment made by the tenants to that effect and the whole thing being done with the approval and consent of the natural guardian would be sufficient in the circumstances to constitute delivery of possession. The character of possession of the donor would be altered from the date of the gift for the purpose of adverse possession.

N. Sivamani and *M. V. Krishnan*, for Appellant.

V. Krishnan and *P. Veeraraghavan*, for Respondent.

V.S.

Appeal dismissed.
Leave granted.

Natesan, J.
19th March, 1965.

Noor Muhammad Rowther *v.*
Kadir Ibrahim Rowther.
S.A. No. 798 of 1961.

Partnership Act (IX of 1932)*—Partnership—Partner or employee—Evidence of conduct—Relationship as held out to third parties and relationship* inter se*—Principles—Burden of proof.*

Under the agreement, the plaintiff did not contribute any capital and all the property of the business were to belong to the other party. The clauses referring to his attention to work, his maintaining proper accounts and submitting the same when demanded, read like an ordinary service agreement. The liability to share the loss in the context appears to be an *in terrorem* clause that proper, honest and loyal service may be rendered. The clinching test for the existence of the relationship of partners that those who conduct the business do so as agents of all persons in the group and on their own behalf and are liable to account for all, is not present in the case. The conduct of parties does not also show that the plaintiff was a partner. Persons may by holding themselves as partners be liable to third parties. As between the parties fighting a litigation contending between themselves that the relationship of partnership exists and seeking dissolution and accounts and division of assets, the standard of proof required to establish the relationship must be higher.

K. Gopalachari K. Sarvabhauman and *G. K. Subramaniam*, for Appellants.

S. Sitarama Ayyangar, for 1st Respondent.

R. Gopalaswami Ayyangar and *S. Rajaraman*, for 2nd Respondent.

V.S.

Appeal dismissed.
Leave granted.

Natesan, J.
16th April, 1965.

T. R. Ramanujam Pillai *v.*
Sri Alagiamannar Rajagopalaswami
Deity, Palayamkottah.
S.A. No. 205 of 1962.

Civil Procedure Code (V of 1908), section 102—No second appeal in a case of small cause nature—Allegations in the plaint—Decisive of the nature of the suit—Conversion into a revision petition—Discretion of Court—To be exercised where questions of jurisdiction are raised.

When the general trustee of the temple took proceedings under section 87 of the Hindu Religious and Charitable Endowments Act of 1951. the defendants covenanted to put the temple land to best use and pay certain amounts to the temple. On the suit filed by the plaintiff for recovery of sums (about one thousand rupees) on the basis of the covenant was decreed by the lower Courts.

Held, the suit is of a small cause nature and no second appeal will lie. The character of the suit has to be determined only by reference to the allegations in the plaint. The claim is based on the failure of the defendants to pay according to the terms of the contract and is cognizable by a Court of Small Causes. The claim is not for rent, nor one for specific performance.

The second appeal was refused to be coverted into a revision petition by the Court in the exercise of its discretion.

R. Gopalaswami Iyyangar, for Appellant.

D. Ramaswami Iyyenger, for Respondent.

V.S. ——— *Appeal dismissed.*

Ramakrishnan, J.
16th April, 1965.

Krishnaswami Mudaliar *v.*
Senapathy Mudaliar.
S.A. No. 368 of 1962.

Deed—Construction—Settlement or will—Different items of properties—Part of deed operating as a will and part as a settlement—Legality.

There is no legal objection to a part of a document operating as a will and a part operating as a settlement in respect of different items of porperties. But such a document must be considered as somewhat unusual and special care will be required to interpret it and to find out the real intention of the executants.

The executants have described the document in the preamble, as a settlement and registered it as a settlement and not as a will. Very strong circumstances would be necessary to infer that it is of a testamentary character.

M. R. Narayanaswamy, for Appellant.

M. S. Venkatarama Ayyar, V. Krishnan and *P. Veeraraghavan*, for 1st Respondent.

V.S. ——— *Appeal dismissed.*

Ramakrishnan, J.
20th April, 1965.

Jamila Bivi *v.*
C.V. Panchapakesa Iyer.
S.A. No. 996 of 1960.

Deed—Construction—Sale deed—Boundaries described clearly—Other properties mentioned only as boundaries—Boundaries to prevail.

Where the boundaries are clearly described without any ambiguity and where the document of sale also expresses a clear intention that the shops together with their subjacent sites constituted only a boundary and were not intended to form part of the property conveyed it would be improper to give to the vendee any title in the shops and their subjacent sites.

K. S. Desikan and *K. Raman*, for Appellant.

M. R. Narayanaswamy, for 1st to 7th Respondents.

V.S. ——— *Second appeal dismissed.*

Ramakrishnan, J.
20th April, 1965.

V. Venkatarama Iyer *v.*
K. Ranganathan Pillai.
S.A. No. 1876 of 1962.

Transfer of Property Act (IV of 1882), *section* 58 (c)—*Sale with an agreement for reconveyance or mortgage by conditional sale—Test.*

No cash was paid for the entire amount of consideration. A conscious intention to show that the relationship of debtor and creditor subsisted between the parties upto the time of the execution of the document is apparent. The property conveyed was worth much more than the consideration recited, in the deed. The consideration for the reconveyance was Rs. 500 less than the consideration for the sale, suggesting that the parties still sought to maintain the relationship of creditor and debtor and that they expected that the enjoyment of the property for three years would give them by way of profits much more than the interest accruing on the debts. At the conclusion of the document the parties specifically described the term for reconveyance as a condition for sale. The transaction is a mortgage by conditional sale.

R. Gopalaswami Ayyangar, for Appellant.

K. S. Desikan, for Respondent.

V.S. ——— *Appeal dismissed.*

Natesan, J.
23rd April, 1965.

Ponnammal Achi *v.*
Chandra Udayammal.
S.A. No. 213 of 1962.

Deed—Construction—" Santhathi "—*Word of wide import ordinarily includes adopted son—Context and circumstances may also exclude adopted son—Absolute gift to a person coupled with a defeasance clause of gift over in case that person died without* santhathi—*Validity.*

The word "*santhathi* " no doubt is a word of wide import and in its context is capable of including an adopted son. In its ordinary connotation *santhathi* denotes, offspring, progeny or issue, children, that is lineal descendants. But in the context of the particular circumstances the word may exclude an adopted son.

A provision whereby a gift is made in favour of a person absolutely coupled with a defeasance clause that if the person died without a *santhathi*, there would be a gift over to another with *santhathi* is valid in certain circumstances. For a defeasance clause of a prior absolute estate contingent on a future event, to be valid, the event must be one that will happen, if at all at the latest immediately upon the close of a life in being at the time of the gift and a defeasance by gift over must be in favour of some person in existence at the time of the gift.

T. S. Kuppuswami Ayyar, for Appellant.

T. R. Ramachandran, and *N. Varadarajan*, for Respondent.

V.S. ——— *Ordered accordingly.*

Srinivasan, J.
30th April, 1965.

Veerappa Mudaliar *v.*
Venugopala Mudaliar.
S.A. No. 846 of 1961.

Will—Interpretation—Inference of intestacy—Practice—Cultivating tenants in possession of property—Suit for mere declaration of title—Maintainable.

Where the testator had no intention at the time of executing the will of acquiring any further properties and he made the bequest in respect of the properties possessed by him then and where there is no residuary clause in the will in favour of any devisee of any after acquisitions there will be intestacy in respect of properties acquired subsequently. The question of intestacy does not arise on construction of the terms of will but arises as a fact by reason of the express recitals in the will.

Where the property is in the possession of cultivating tenants a suit for the mere declaration of the title is maintainable.

R. Gopalaswamy Ayyangar and *R. Balasubramania Ayyar*, for Appellant.

T. Sundaralingam, *T. K. Subramania Pillai*, *T.R. Ramachandran* and *S. Jayaraman*, for Respondents.

V.S. — *Second appeal dismissed.*

Chandra Reddy, C.J., and *Ramamurti, J.*
30th April, 1965.

Mrs. C. Parimalasunadri *v.* P.M. Sundaram.
A.A.O. Nos. 307 and 368 of 1963.

Tort—Negligent and rash driving by taxi driver—Hitting pedestrian and causing death— Res ipso liquitur—*Applicability—Damages payable to dependents—Considerations in fixing.*

The evidence of the passenger in the taxi was that it was driven at a high speed. The dashing of the taxi against the water pipes kept on the pavement on the right exterior of the road, the capsizing of the taxi and the deceased being seen near the luggage boot found lying with bleeding injuries with the cycle (on which the deceased was driving) lying there with its wheels by the side of the luggage boot of the car, all constitute powerful evidence pointing to the irresistable conclusion of negligence on the part of the driver. There was no rebutting evidence and the inference is irresistable that the taxi driver with a view to avoid collision from the car coming from a side road drove the taxi without regulating the speed to the wrong side of the road and dashed against the big water pipes. The circumstancs of the case constitute powerful evidence of negligence and the maxim '*res ipso loquitur*' (the thing speaks for itself) clearly applies to the instant case.

The fact that in the criminal case the driver was acquitted in a prosecution for an offence under section 304-A, Indian Penal Code, is of no significance in an enquiry on a claim for damages by the dependents of the perrson killed in the accident.

In fixing damages the Court should view the matter in a broad spirit. It should take into account the chance of life, prospects of improved condition in the service and the ultimate benefit which the family would get in case the deceased led a normal life.

S. Mohan Kumaramangalam for *A. K. Shanmugasundaram* and *K. Sengottian*, for Appellants in A.A.O. No. 307 of 1963 and for Respondents 1 to 4 in A.A.O. No. 368 of 1963.

V. M. Lenin for 1st Respondent in A.A. O. No. 367 of 1963 and for the 5th Respondent in A.A.O. No. 368 of 1963.

K. G. Jacob and *S. K. L. Ratan*, for 2nd Respondent in A.A.O. No. 307 of 1963 and for Appellant in A.A.O. No. 368 of 1963.

K.S. — *Appeal dismissed.*

Natesan, J.
12*th March*, 1965.

Arumugam Chettiar *v.* Viswasa Nadar.
S.A. No. 99 of 1962.

Will—To A's *sons for their lives and remainder to grandsons—Death of one son of* A—*Bequest of joint tenancy or joint gift or bequest in severalty—Construction of terms—Intention of the testator—Bequest in severalty.*

The concept of joint tenancy as prevalent in English Law is foreign to Hindu Law, and could not be imported in the construction of wills of Hindus. But depending upon the intention of the testator as could be gathered from the language of the will and the surrounding circumstances, it can be considered whether the bequest was a joint gift or gift in severalty.

On the construction of the will *held* that the bequest in favour of the sons of *A* was one in severalty. Therefore on the death of one of them issueless, there would be an intestacy in respect of one-third share and the father *A* will become entitled to a share.

V.S. *Appeal allowed in part.*

Kailasam, J.
18*th March*, 1965.

M. A. Sathar Khan Sahib *v.* M. D. Kasim Sahib & Syed Saheb Co.
A.A.A.O. No. 140 of 1960.

Charge—Security bond—Bond denying liability on a promissory note but reciting, if found liable, offering property set out therein as security—Suit, decree and property purchased by stranger in execution—If a charge decree or charge created for the first time under the decree—No contingent charge—Validity of sale in execution—Absence of attachment—Irregularity, not invalidating sale.

The judgment-debtor executed a promissory note for Rs. 3,200 in favour of the decree-holder in 1952. I. P. No. 9 of 1954 was filed for adjudicating the judgment-debtor as an insolvent. To ward off the insolvency proceedings, the judgment-debtor executed a security bond, wherein the judgment-debtor denied his liability under the promissory note, but stated if he was found liable to pay the decree-holder on the promissory note, the property which he gave as security would be liable. Then the decree-holder filed a suit and obtained a decree and in execution the property offered as security was purchased by a stranger. On the question if the decree was a charge decree and if the property could be sold in execution,

Held, on a reading of the security bond, the plaint and the decree, the suit was not based on the charge or for enforcement of the charge. The decree only created a charge for the first time. The decree entitled him to proceed against the person for realizing the money and the same can be executed against the property. The absence of any attachment would only be an irregularity and would not invalidate the sale. The security bond did not also create any contingent charge.

K. Parasaran, for Appellant.

T. R. Ramachandran, for Respondent.

V.S. *Appeal dismissed.*

Chandra Reddy, C.J. and *Ramamurthi, J.*
21st April, 1965.

B. Govindarajulu Chetty *v.* M. L. A. Govindaraja Mudaliar.
A.A.O. No. 139 of 1964.

Motor Vehicles Act (*IV of* 1938), *section* 110—*Owner of lorry entrusting vehicle to an automobile workshop repairer—User of the lorry by the servant of the repairer unauthorisedly and without permission of the repairer—Causing the accident resulting in the death of a person—Compensation claim before the Claims Tribunal—Liability of the owner—Lorry, if a dangerous chattel as to attract the doctrine of absolute liability—Entrustment to repairer—If an inherently dangerous and hazardous act—Casual or collateral negligence of independent contractor or his servant—Dismissal of claim for compensation—Amounts to an "award" and an appeal against the decision competent.*

The relationship between the owner of a motor vehicle and the proprietor of an automobile workshop and repairer is only that of an independent contractor and not that of master and servant, judged by any test.

The entrustment of a lorry for repairs is not by itself an inherently dangerous and hazardous act and lorry cannot be regarded as an inherently dangerous chattel so as to be governed by the exception to the rule that a person is not vicariously liable for the commission of tort consequent upon the negligence of a third party. A lorry is not such a dangerous chattel as to attract the doctrine of absolute liability.

It is not the duty of the owner of the lorry (and indeed it is impossible) to anticipate and guard against somebody in the repairer's shop taking the lorry and involving the same in an accident.

The employer is never held responsible for what is called the casual or collateral negligence of the contractor or his servant.

The expression "award" in section 110-D of the Motor Vehicles Act must be understood as the decision of the Claims Tribunal whether a total dismissal of the claim or the determination of a particular amount of compensation is made. An appeal against the decision rejecting the claim for compensation will lie.

C. S. Rajappa, for Appellant.

D. Ramaswami Iyengar for *K. Venugopala Iyengar*, for Respondents 1 and 2.

V.S. ——— *Appeal dismissed.*

Kunhamed Kutty, J.
26th April, 1965.

Ganapathia Pillai, *In re.*
Crl.R.C. No. 909 of 1964.
(Crl.R.P. No. 885 of 1964.)

Madras Prohibition Act (*X of* 1937), *section* 5 *and rule* 6—*Rendering or attempting to render fit for human consumption any spirit or preparation containing spirit which has been denatured—French Polish added with water and salt—No trace of addition of acid and calcium carbonate—No offence made out—Sections* 4 (1) (*a*), 11, *and rule* 6—*Possession of French Polish—Wilfulness—Necessary ingredient—Neither suggested nor proved—Conviction unsustainable.*

The opinion of the Analyst was that the content was varnish on which an attempt had been made to make it potable by adding water and sodium chloride. The Scientific Assistant in cross-examination admitted that for neutralising pyridine, acid and calcium carbonate must be also added, and that salt alone cannot neutralise pyridine. In effect the testimony was that the poisonous matters in the denatured spirit would not be neutralised by adding water and salt, and that, unless pyridine is completely removed, it cannot be said to be denatured spirit. Unless acid is found to be an integral part of the denatured spirit, which alone can make it potable, it cannot be said that the petitioners have rendered or attempted to render the spirit in question to be potable.

Wilfulness in the contravention of rule 6 relating to possession of 18 gallons of French Polish (varnish) is an ingredient necessary to invoke section 11 and where such wilfulness has neither been suggested nor proved, the conviction under rule 6

and rule 11 of the Madras Denatured Spirit, Methyl Alcohol, and Varnish (French Polish) Rules, (rule 11 had been abrogated by G.O. Ms. No. 3166, Home, dated 11th October, 1960) cannot be sustained.

G. Gopalaswami for *G. Ramaswami*, and *P. Raghaviah*, for Petitioners.

S. R. Srinivasan for Public Prosecutor for the State.

V.S. ——— *Petition allowed.*

Venkatadri, J. Raju Thevan, *In re.*
1st June, 1965. Crl.M.P. No. 1100 of 1965.

Criminal Procedure Code (V of 1898)—Accused remanded to custody—Continued detention under the 'parrot like orders' without the Magistrate taking cognizance of the case—Detention illegal—'Taking cognizance'—Jurisdiction—What constitutes—Release on conditional bail.

'Taking cognizance of the case' will indicate and include the intention of initiating judicial proceedings against the offender in respect of the offence, or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. Before it can be said that any Magistrate has taken cognizance of the case, he must have applied his mind to the offence for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Code. Taking cognizance is a judicial act. A Magistrate may have jurisdiction to try the case, but taking cognizance of an offence is something quite different from jurisdiction to deal with the case.

The main principle in considering the question of bail is whether the accused will stand his trial or abscond. It is the right of the accused person to demand that the charge against him should be brought to his notice and should be tried without reasonable delay.

Where the Magistrate passed 'parrot like orders,' like 'Perused investigation records. Investigation is progressing. Hence further remand granted', in a light-hearted fashion, it does not amount to taking cognizance of the case, and the orders of remand from time to time and the consequent detention are illegal. But as the case is pending the petitioners should be released only subject to some conditions.

R. Santhanam, K. Narayanaswami Mudaliar, J. S. Athanasius and *M. Narayanamurthi*, for Petitioners.

V. P. Raman, Public Prosecutor, for the State.

V.S. ——— *Conditional bail granted.*

Venkatadri and Public Prosecutor *v.* N. Poongavanam.
Sadasivam, JJ. Crl. Appeal No. 797 of 1964.
3rd June, 1965. Crl. R.C. No. 1657 of 1964.
Crl.R.P. No. 1627 of 1964.

Penal Code (XLV of 1860), sections 302, 326—Accused stabbing deceased in the hand and shoulder—Application of cow-dung to the wound—Death, following septic condition caused by contamination—Conviction under section 326—Legality.

There must be shown to be a direct and distinct connection between the act of the accused and the death of the deceased and not merely unbroken chain of causes and consequences. The act of the accused must be the *causa causans* of the death. If the death of the deceased was really due to the act of a person in applying cow-dung causing septic condition by contamination to an open wound, which was, by itself, not likely to cause death, no conviction under section 302 could be made.

Public Prosecutor, for State.

G. Kanniah, for Respondent.

V.S. ——— *Appeal dismissed.*

Sadasivam, J.
22nd June, 1965.

Dhandayuthapani Servai, *In re.*
Crl. R.C. Nos. 1305 and 1306 of 1964.
Crl.R.P. Nos. 1279 and 1280 of 1964.

Madras Shops and Establishments Act (*XXXVI of* 1947), *sections* 1 (5), 2 (12) (vii), 2 (16), 2 (5) *and* 4, *Rules* 11 (5), 18, 16 (1) (4) *and* (ii)—*Premises for manufacture of soapnut powder—Sale outside the premises—Not notified as an 'industrial establishment'—Premises, a shop within the scope of the Act—Persons employed from morning to evening on piece rate basis—Wholly or principally employed by the employer—Prosecution of Manager for non-compliance of rules relating maintenance of prescribed registers.*

The premises where the manufacture of soapnut powder is made but the actual sale takes place outside the premises, will still fall under the scope of "shop" as defined under the Act. In the absence of a notification making the premises an 'industrial establishment,' the premises will be a shop within section 2 (16) of the Madras Shops and Establishments Act. Where persons employed by the petitioner work from morning to evening except an hour for lunch break and receive wages, though on the actual amount of work done by them it could not be said that they were not wholly or principally employed in the business of the petitioner. The exemptions mentioned in section 4 (1) of the Act do not exempt the manager from being prosecuted under the Act, having regard to the clear definition of 'employer' as including a manager.

Public Prosecutor v. *Sundaradara Rao,* (1963) 2 An.W.R. 125 : (1963) M.L.J. (Crl.) 357, disagreed with.

K. Narayanaswami Mudaliar, for Petitioner.

S. R. Srinivasan, for Public Prosecutor, for the State.

V.S. —— *Revision dismissed.*

Kailasam, J.
23rd June, 1965.

Rangaswami Goundar *v.*
Ramana Goundar.
A.A.A.O. No. 90 of 1964.

Civil Procedure Code (*V of* 1908), *sections* 2 (2) *and* 47 (2)—*Execution—Order converting execution application into a suit—Appeal against order—Competent.*

Section 2 (2) of the Code defining 'decree' provides that 'it shall be deemed to include the determination of any question within section 47'. Therefore an order under section 47 (2) converting an execution application into a suit is appealable.

The executing Court on the allegations came to the conclusion that this is a fit case for converting the petition into a suit. Section 47 (2) of the Civil Procedure Code provides that the Court may subject to any objection as to limitation or jurisdiction, treat a proceeding under section 47 as a suit. It cannot be said that the exercise of the jurisdiction by the trial Court is erroneous.

G. N. Chary, for Appellants.

P. S. Ramachandran, for Respondent.

V.S. —— *Appeal dismissed.*

Natesan, J.
3rd July, 1965.

A. R. Sundaram *v.*
Government of India.
C.R.P. No. 1714 of 1962.

Civil Procedure Code (*V of* 1908), *Order* 44, *rule* 1 (2)—*Application for leave to appeal* in forma pauperis—*Applicant or his Counsel must be heard.*

The Court must hear the applicant or his pleader or the application for leave to file the appeal *in forma pauperis* after fixing the date for hearing. A disposal rejecting the application without hearing the applicant or his Counsel by mere perusal of the judgment cannot be sustained.

S. Ramasubramaniam, for Petitioner.

T. N. C. Rangarajan, for Government Pleader.

V.S. —— *Petition allowed.*

Sadasivam, J.
15*th July*, 1965.

Veerammal *v.* Thambi Ayyah Velalar.
Crl. M.P. No. 1635 of 1965 in
Crl.R.C. No. 958 of 1964.

Criminal Procedure Code (*V of* 1898), *section* 145—*Proceedings under—Adding new party before the enquiring Magistrate or the revisional Court—Not provided in the Code.*

There is no provision in the Criminal Procedure Code for impleading any new party in proceedings under section 145 either before the Magistrate enquiring into the proceedings or in any revisional Court.

R. G. Rajan, for Petitioner.

G. Gopalaswami and *R. Rajagopalan*, for Respondent.

S. R. Srinivasan, for Public Prosecutor for State.

V.S. ——— *Petition dismissed*

Natesan, J.
16*th July*, 1965.

Sellakumara Goundar *v.*
Lakshmi Ammal.
C.R.P. No. 1509 of 1962.

Madras Cultivating Tenants' (Payment of Fair Rent) Act (*XXIV of* 1956), *sections* 4, 5 *and* 15—*Fixation of fair rent—Cash value of produce—To be based on legal evidence—Option to pay rent in kind—Exclusion of certain lands on which sugar-cane and plantations are raised.*

In computing the cash value of the produce, the prices of the produce must be based upon legal evidence. Judicial tribunals must act on evidence brought on record. If the tenant was entitled to the option to pay the rent in kind, under section 5 of the Act, the order must be modified accordingly. Under section 15 of the Act, the income from lands in which sugar-cane, plantations are raised as the main crop, should be excluded in fixing the rent.

V. N. Venkatavaradachariar, for Petitioner.

R. Sengottian, for Respondent.

V.S. ——— *Petition allowed.*

Natesan, J.
19*th July*, 1965.

Mohamed Shareef Sahib *v.*
Abdul Rahiman Sahib.
C.R.P. No. 1682 of 1962.

Promissory Note—Insufficiently stamped—Assignment by endorsement—Suit on the debt—Maintainability.

There is a vital distinction between the transfer of a debt and the transfer of the promissory note and a suit on the debt differs in substance from a suit on a promissory note. If there is an assignment of the debt the assignment will have to be duly stamped under the Stamp Act.

Though no particular form is required for transfer of a debt, still when there is an endorsement the Court has to construe it to find whether in fact what is transferred is the debt or the promissory note alone.

The Court will liberally interpret the endorsement so as not to defeat a *bona fide* assignee of his rights.

Where the actual language of the endorsement speaks of the note being made over, it would be an assignment of the promissory note and not of the debt. If the note was insufficiently stamped, the suit has to fail.

V. Krishnan and *P. Veeraraghavan*, for Petitioner.

T. V. Balakrishnan and *M. Vanchinathan*, for Respondent.

V.S. ——— *Petition allowed.*

Kailasam, J.
22nd July, 1965.

Chidambaranathan *v.* Picha Nadar.
A.A.O. No. 127 of 1962.

Travancore-Cochin Holding (Stay of Execution Proceedings) Act (VIII of 1950), *section* 4—*Decree for possession—Application for execution made within two years of the decree, delivery ordered without notice—Delivery taken by decree-holder contrary to the provisions of the Act—Question of default in payment of rent—Default to be considered before Court directs re-delivery.*

Where the application for execution of the decree for possession was made within two years of the decree and the same was ordered without notice and consequently delivery was effected.

Held: As T.C. Act VIII of 1950 was in force, execution of the decree for delivery of possession was stayed, and therefore the delivery ordered and effected is contrary to the provisions of the Act and *prima facie* the judgment-debtor is entitled to re-delivery of possession. Under the proviso to section 4 the Court is given a discretion to direct delivery of possession, if there has been a failure to pay the rent which has accrued due after the commencement of the Act.

But in the instant case it will be technical to direct re-delivery first and then permit the decree-holder to establish that there has been default in the payment of rent, and again ask for delivery of possession. In the circumstances, if the Court finds that the case of default is made out by the decree-holder, re-delivery need not be ordered.

T. R. Ramachandran, for Appellant.

R. Gopalaswami Iyengar, for Respondent.

V.S. ——— *Appeal remanded.*

Natesan, J.
23rd July, 1965.

A. S. Sheik Mohamed Maracair *v.*
K. T. Mohammed Ibrahim Ummal.
C.R.P. No. 1374 of 1965.

Madras Court-fees Act (XIV of 1955), *section* 69—*Refund of Court-fee on settlement before hearing—Hearing after setting aside* ex parte *decree—Memo of compromise filed—Prayer for recording compromise and suit settled out of Court—Claim for refund—Untenable.*

The parties did not pray for the mere dismissal of the suit as settled out of Court but insisted on the Court recording the memo. of compromise filed. The actual order of the Court was for recording the compromise, a decree to be drawn up in terms of the compromise in so far as it related to the subject-matter of the suit. The matter has been proceeded with under Order 23, rule 3 of the Civil Procedure Code. The language of section 69 of the Court-fees Act does not provide for a refund of Court-fee, where a compromise is got decreed by the Court. Refund is provided for only in cases where the suit is got dismissed as settled out of Court.

While seeking a record of compromise and the terms of the settlement, if a term is first put into the memo. to the effect that the suit is settled out of Court, and is being withdrawn, it looks like a camouflage for the purpose of getting a refund of Court-fee, the other terms of the compromise and the prayer in Court for recording the terms being inconsistant with a plain decree of dismissal of the suit.

In this view it was held unnecessary to consider whether merely recording of evidence on the merits at an earlier stage of the suit, when the defendant had not even entered appearance but were set *ex parte,* will, by itself, debar the plaintiff from claiming refund of half the Court-fee, if, later, the suit is got dismissed as settled out of Court.

V. Ratnam, for Petitioner.

K. Gopalaswami, for Government Pleader.

V.S. ——— *Petition dismissed.*

Veeraswami and *Venkatadri, JJ.*
31st March, 1965.

State of Madras *v.* Sambandamurthi Mudaliar.
Appeal No. 276 of 1962.

Madras Hindu Religious and Charitable Endowments Act (*XXII of* 1959), *section* 6 (11)—*Hereditary trustee—Succession to office regulated by usage—Election of trustee by a particular community in accordance with usage but only for a term—Not a hereditary trustee—Sections* 70 (1) (*i*), 116 (2) (vi) *and Rule* 3 (ii)—*Limitation for institution of a suit—Application for copy made to Deputy Commissioner who could not grant it—Rule requiring Deputy Commissioner to transmit it to the Commissioner for compliance—Time taken in obtaining copy—Exclusion in computing limitation.*

The definition of ' hereditary trustee ' in section 6 (11) in Madras Hindu Religious and Charitable Endowments Act (1959) is in terms, of succession to the Office as regulated by usage. While succession indicates continuity, it also implies that it is from one to another. A trustee may be elected by the community in accordance with an usage, but if the office is to be held only for a term, he cannot be regarded as a hereditary trustee.

A copy of the order of the Commissioner was transmitted to the plaintiff without the annexure. The plaintiff applied to the Deputy Commissioner for the copy of the annexure. The Deputy Commissioner, if the copy could not be granted by him, must forward the application to the Commissioner as laid down under rule 3 (ii) framed under section 116 (2) (vi) of the Act, for compliance. Though the plaintiff, at the instance of the Deputy Commissioner applied again to the Commissioner, the time from the date of the original application to the Deputy Commissioner must be excluded in the computation of the period of limitation for filing the suit.

Government Pleader *A. Alagiriswami*, for Appellant.

Mohan Kumaramangalam, for Respondent.

V.S. *Appeal allowed.*

Srinivasan, J.
15*th April*, 1965.

Mysore Cafe, by Proprietor *v.* State of Madras.
W.P. Nos. 1287, 1288 and 1382 to 1390 of 1962.

Madras Catering Establishments Act (*XIII of* 1958); *section* 29 *and rule* 13 *of the Rules framed under it—Rule requiring the supply of dress to the employees of catering establishments—Rule* ultra vires *the Act.*

Rule 13 of the Rules framed under section 29 of the Madras Catering Establishments Act, requiring the supply of dress to the employees of the catering establishments is *ultra vires* the Act.

Whether the benefit of supplying dress for the employees is includible in the term " wages " or not, no provision of the Act enables the computation of any amount in that regard ; nor does any provision of the Act lay a burden upon the employer to meet this type of expenditure. The relevant rule does not accordingly flow from the power given by section 29(1) of the Act to make Rules for carrying into effect the provisions of the Act. The entire scope of section 29 (2) (*e*) enabling the State Government to make Rules relating to the health of the employees in a catering establishment or the sanitation of the establishment, is one for the benefit of the public and not in the interest of the worker. Rule 13 for the supply of dress to the employee cannot be brought within the scope of the rule.

(*Obiter*) If the rule is made validly, the rule by itself is not discriminatory.

M. K. Nambiyar for *K. K. Venugopal*, for petitioners.

K. S. Bakthavathsalam, for Additional Government Pleader.

V.S. *Petition allowed.*

Natesan, J.
2nd July, 1965.

Krishna Thevar *v.*
Muthammal.
C.R.P. No. 1543 of 1962.

Madras Cultivating Tenants' (Payment of Fair Rent) Act (XXIV of 1956), *sections* 9 (2), 15—*Fixation of fair rent—Part of land cultivated with plantains—To be left out in the computation of fair rent—Outside the scope of the Act.*

Where crop of the kind set out in section 15 of Payment of Fair Rent Act (plantains in the instant case) is being raised in a parcel of the leased land, that parcel must be left out in the computation of the fair rent in regard to the rest of the area. The rent for the parcel thus left out will be outside the Fair Rent Act.

S. Mohan, for Petitioner.

S. Palanisami, for Respondent.

V.S.

Ordered accordingly.

Chandra Reddy, C.J. and
Natesan, J.
12th July, 1965.

P. Doraikannu *v.*
Proprietor, Hotel Savoy.
C.R.P. No. 604 of 1963.

Payment of Wages Act (IV of 1936), *section* 15—*Authority deciding question of delay in the payment of wages—Suspension of employee pending enquiry—No term for suspension in the contract of employment—Awarding wages for the period of suspension—Jurisdiction of the Authority under the Act.*

The contract of service subsists between the employer and the employee even during the period of suspension and in the absence of a term in the contract permitting the employer to suspend the employee pending enquiry against him, he must be deemed to be in service and entitled to remuneration, the fact that he was not allowed to work, not making any difference in this behalf. In the absence of a rule permitting the employer to suspend the employee for some reason or other, it is not within the powers of the employer to suspend the employee and refuse to pay him wages therefor. The non-payment of wages for a number of months on the ground of suspension would amount to delaying payment of wages and the Authority has jurisdiction under section 15 of the Act to award wages for the period of suspension.

S. Ramaswamy, for Petitioner.

Ghani, amicus curiae for Respondent.

V.S.

Petition allowed.

Srinivasan, J.
13th July, 1965.

A. K. Raman, Raman Transports *v.*
R. T. A., Chingleput.
W.P. No. 1111 of 1964.

Motor Vehicles Act (IV of 1939), *section* 48 (3) *as amended by Act (III of* 1964), *section* 5 (2)—*Effect of the amending Act—Grant of variation of route—Validity of grant of variation, despite Full Bench decision, not affected as a result of the amending Act—Order of statutory authority rejecting application—No revival to be dealt with under the amended Act.*

The Regional Transport Authority, after remand, again granted the variation of the route to the respondent, on 3rd December, 1962. The petitioner filed a revision to the State Transport Appellate Tribunal which set aside the grant of variation on 30th October, 1963. The respondent filed a writ petition and obtained stay of the order of the Appellate Tribunal, but the stay was however, vacated on 20th January, 1964. This was prior to the passing of the Act No. III of 1964. The writ petition was withdrawn on 26th June, 1964. Then the Regional Transport Authority, purporting to act under Act III of 1964, without notice to the petitioner, on the basis of the original order dated 3rd December, 1962 granted the variation to the respondent. On the question of the validity of the order,

Held, the order made was one without jurisdiction.

Section 5 (2) of Act III of 1964 states that where an order had been made granting a variation, despite the decision of the Full Bench, it shall not be deemed to be invalid. It does not go further and deal with a case where the appropriate statutory authorities had ultimately refused the grant of a variation. Section 5 (2) does not step in and revive such an application and direct such an application to be disposed of in accordance with Act III of 1964.

K. K. Venugopal, for Petitioner.

K. Tirumalai, for Respondent.

V.S. *Petition allowed.*

Natesan, J.
23*rd July*, 1965.

Ratnaswamy Nadar *v.*
K. Subbuswami Iyer.
C.R.P. No. 1376 of 1962.

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *section* 69—*Refund of fees on settlement before hearing—Recording of evidence on the merits of claim—Exhibits marked in evidence—No oral evidence taken—Subsequent dismissal of suit as settled out of Court—Not entitled to the refund.*

It is not disputed that exhibits that had been marked in evidence related to the merits of the claim. Section 69 of the Madras Court-fees Act refers to any evidence being recorded ; that means, even if documentary evidence, relating to the merits of the claim has gone into the records, the party will not be entitled to the benefit of refund provided under section 69 of the Act.

The case, where there are several reliefs that are severable, and there had been no adjudication in respect of some of the reliefs, and no evidence recorded on the merits of the claim, relating to those reliefs there could be refund of court-fee with reference to those reliefs, if the claim in regard to them was settled out of Court and the suit got dismissed, is distinguishable.

T. Martin, for Petitioner.

S. D. Ramalingam, for Government Pleader for State.

V.S. *Petition dismissed.*

Natesan, J.
24*th July*, 1965.

Corporation of Madras *v.*
Smt. Ch. Balamoney.
C.R.P. Nos. 1122 to 1126 of 1962.

Madras City Municipal Act (*IV of* 1919), *section* 138, *Schedule IV*, *Part V*, *rules* 15, 17—*Property tax—Orders of the Taxation Appeals Committee—Appeal to the Small Cause Court—No appeal provided at the instance of the Commissioner, Corporation.—Appeal lies at the instance of the ratepayer only.*

No appeal is provided for at the instance of the Commissioner of the Corporation against the orders made by the Taxation Appeals Committee in regard to property tax. From the collocation and juxtaposition of the material words in rules 15 and 17 of Schedule IV to the Madras City Municipal Act, and the requirements under these Rules, an appeal is provided only for the aggrieved ratepayer. The appeal preferred by the Commissioner against the decision of the Taxation Appeals Committee to the Small Cause Court is hence incompetent.

T. Chengalvarayan, for Petitioner.

T. Ramaprasada Rao, for Respondents.

V.S. *Petition dismissed.*

Anantanarayanan, O.C.J. and *Ramakrishnan J.*
19th August, 1965.

C. Hariprasad *v.* G. Vasantha Pai.
Contempt App. No. 7 of 1964.

Contempt of Courts Act (XXXII of 1952), *section 3—Rules framed under—Suit on the Original Side pending—Interlocutory application —Affidavit of defendant containing allegations against Counsel for Plaintiff—Letter by Plaintiff's Counsel to Counsel for defendant demanding apology and intimating, on failure, of taking proceedings for defamation and referring to Bar Council—Application by defendant for contempt—Non-compliance with the prescribed rules—Proceedings rendered void and without jurisdiction—Subsequent deletion of offending portions in the affidavit—Contempt proceedings not affected—No contempt constituted by writing of the letter.*

Pending an Original Side suit, the second defendant therein and petitioner herein, in the affidavit in support of an interlocutary application averred "that the plaintiffs (Company) has shifted its registered office to a place adjacent to the office of its Counsel, (respondent herein) so that he may be enabled to get affidavits made to his dictation, that the office is practically under the advice and supervision of the Counsel and its present activity is the prosecution of various proceedings against me and other defendants". The respondent thereupon sent a notice to the Counsel for the defendant stating " I intend proceeding againt you in a Court of Law in a suit for defamation and also to bring this to the notice of the Madras State Bar Council, unless you unconditionally apologize to me and take steps to have the said paragraph deleted from your client's affidavit......". The offending portions in the affidavit were subsequently deleted by the judge before whom the suit was pending. The defendant filed an application for contempt originally on the Original Side which came up before a Bench for notice and final hearing. On the question of jurisdiction,

Held, under the Rules framed under the Contempt of Courts Act, in regard to a contempt committed before the High Court Judge, the Judge will have power to punish the offender forthwith. In other cases the Judge, or Judges, as the case may be, will have to draw up a charge and send it to the Chief Justice, who will then send it to the Advocate-General for taking apporpriate action.

The non-compliance with the prescribed rules will render the proceedings void and without jurisdiction.

The subsequent deletion of the offending portions in the affidavit cannot bring the contempt proceedings to an end. They will still require to be considered on the merits.

Even on the assumption, that the application has been validly presented and within the jurisdiction, what actuated the respondent was not a desire to interfere with the course of justice or to cause obstruction to it, but to protect himself from baseless and defamatory allegations. The respondent cannot be held guilty of Contempt of Court.

G. Ramaswamy, for Petitioner.

G. Vasantha Pai, for Respondent.

V.S.

Application dismissed.

Veeraswami and *Venkatadri, JJ.* 25*th August*, 1965.

Perumal Nadar (died) *v.* Ponnuswami Nadar, minor by mother. A.S. No. 177 of 1961.

Hindu Law—Marriage of a Christian woman with a Hindu male—Validity—Principles under the Hindu Law.

Marriage contracted in Travancore State—Legality not affected by Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949)—Domicile—Evidence of—Change of domicile—Onus.

Evidence Act (I of 1872), *section* 112—*Child born of lawful wedlock—Presumption—Proof of non-access—To be strong, distinct, satisfactory and conclusive, to displace the presumption of legitimacy.*

Hindu law would apply even to converts to Hinduism and it is not necessary for its application that a person should be a Hindu by birth. It applies not only to a person who is a Hindu both by birth and religion but also to a person who is a Hindu only by religion.

The mere fact that a non-Hindu professes a theoretical allegiance to the Hindu faith or is an ardent admirer and advocate of Hinduism does not make him a Hindu.

Long residence in India, abdication of the original religion by a clear act of renunciation, adoption of the Hindu religion by a formal conversion thereto, assumption of a Hindu name, marrying a Hindu according to the Hindu rites and taking to the Hindu mode of life are proofs that a non-Hindu has become a Hindu.

But it is not necessary that every one of these tests should be fulfilled. It is also not necessary that there should be established a formal conversion to Hinduism. Since there are no ceremonies prescribed in the Smritis for conversion to the Hindu religion one has to look to the sense of the community into which the convert is alleged to have been let in and if the members of that community are prepared to receive him as one of themselves, the fact that there has been no purificatory or expiatory ceremonies, does not militate against that person being treated in law as a member who has been admitted into the Hindu fold.

There is a presumption in favour of the continuance of an existing domicile. Therefore the burden of proving a change lies in all cases upon those who allege that a change has occurred. The relevant evidence of domicile would be naturalization, purchase of house, the exercise of political rights, the establishment of children in business, the place where a man's wife and family reside, etc. An intention to change a domicile of origin is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years.

Where the parties resided at the time of the marriage in the Travancore State, the Hindu Bigamy Act of 1949 would not be applicable to affect the validity of their marriage.

The conclusive presumption of legitimacy enacted in section 112 of the Evidence Act can be displaced only by a clear and satisfactory proof of non-access.

K. Rajah Iyer, for Appellant.

S. Chellaswami, for Respondent.

V.S. *Appeal dismissed.*

Natesan J. 27*th August*, 1965.

M/s. Gocooldas Jumnadas Trust *v.* M/s. Leela Vasan Coffee Works. C.R.P. No. 1636 of 1962.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (*b*) *—Landlord, a charitable trust running a hospital occupying the first floor—Groundfloor in possession of tenant doing business—Application for possession of groundfloor—Test of* bona fide *the only requisite—Section* 25—*Powers of revision and questions of fact.*

In an application made by a landlord, a charitable institution, running a hospital in the first floor for possession of the groundfloor in the occupation of a tenant, under section 10 (3) (*b*) of the Act the only requisite is the *bona fide* nature of

the claim. There is a special provision and no other restriction contained in the other sub-clauses of the section can be applied. The considerations relevant to an application for additional accommodation are not germane to the application under section 10 (3) (*b*) of the Act.

Finality could be claimed only to a finding based on relevant facts and the High Court under section 25 of the Act under the revisional powers can examine the propriety of the finding. A mere reference to the observation in the order of the Courts below that the evidence of the respondent is believed and that of the appellant disbelieved cannot bolt the door against scrutiny of the tenability of the finding. There must be facts which if believed could sustain the conclusion in question.

V. Venkateshayya and *S. Veeraraghavachari*, for Petitioner.

V. Srinivasa Ayyar and *K. Raman*, for Respondent.

V.S. — *Petition allowed.*

Kailasam, J.
31*st August*, 1965.

Vettaikkaranpudur Mahajana Bank, Ltd. *v.* Swamiappa Gounden.
S. A. No. 377 of 1962.

Madras Agriculturists Relief Act (*IV of* 1938), *section* 13—*Debts incurred after the Act—No scaling down by any theory of renewal—Neither a prohibition against a stipulation for payment nor an automatic discharge of higher rates of interest agreed—Interest paid and appropriated—Not to be reopened.*

The two Full Bench decisions of the Madras High Court in dealing with a case of debts incurred by an agriculturist debtor after the coming into force of Madras Act IV of 1938 under section 13 of the Act have laid down that there is no provision for scaling down the debt by going behind the suit debt on any theory of renewal, that there is neither a prohibition against a stipulation for payment nor an automatic discharge of higher rates of interest stipulated under the contract and that interest paid and appropriated cannot be reopened. The Supreme Court in *Krishnayya* v. *Seshachalam*, (1965) 1 S.C.J. 533 : (1965) 1 M.L.J. (S.C.) 86 : (1965) 1 An.W.R. (S.C.) 86, while dealing with a case of a debt incurred before the Act came into force, while approved the observations made in the decision of the Andhra Pradesh High Court in *Nainamul* v. *Subba Rao*, (1957) 2 An.W.R. 53 (F.B.) (dissented by the Madras Full Bench decisions) did not indicate that the Supreme Court in any way doubted the correctness of either of the two Full Bench decisions of the Madras High Court.

A.I.R. 1965 S.C. 639 ; (1961) 2 M.L.J. 222 (F.B.) ; (1958) 2 M.L.J. 568 (F.B.) ; A.I.R. 1962 Mad. 1; A.I.R. 1959 Mad. 96 and A.I.R. 1957 A.P. 546, referred.

K. Sarvabhauman, for Appellant.

T. R. Ramachandran and *N. Varadharajan*, for Respondent.

V.S. — *Appeal allowed ; Leave granted.*

Kailasam, J.
3*rd September*, 1965.

Shanmugam Nadar *v.* Sivan Pillai.
S.A. No. 1579 of 1963.

Transfer of Property Act (*IV of* 1882), *sections* 91, 94—*Suit by prior mortgagee without impleading the puisne mortgagee—Auction purchaser in such sale—Suit by puisne mortgagee—Auction purchaser in such sale—Right of redemption—Right of auction purchaser in puisne mortgagee's sale to prevail.*

While the puisne mortgagee can bring a suit without impleading the prior mortgagee, the prior mortgagee is required to implead the puisne mortgagee as a party to his suit. If the puisne mortgagee had been made a party, he would have the option of redeeming the mortgage. The right of the puisne mortgagee to redeem a prior mortgagee cannot be prejudiced by a Court sale at the instance of the prior mortgagee without impleading the puisne mortgagee. Though in law the purchaser in the prior mortgage sale as an assignee of the mortgagor is entitled to redeem, his right of redemption in law or in equity cannot prevail over the puisne mortgagee's right to redeem.

S. Padmanabhan and *N. D. Jose*, for Appellant.

T. R. Ramachandran, for Respondents 1 and 2.

T. Srinivasan (Court guardian) for Respondents 3 to 8.

V.S. ——— *Appeal dismissed; No leave.*

Anantanarayanan and *Natesan, JJ.*
7th September, 1965.

Reserve Bank of India *v.* Vasanthi Raman.
W.A. No. 162 of 1965.

Reserve Bank of India Act (*II of* 1934) *and Foreign Exchange Regulation Act* (*VII of* 1947), *section* 18-B—*Application for permission in Form* " *P* " *for passage to United Kingdom by air line—Rejection by Reserve Bank in accordance with the revised policy—Writ of* mandamus—*Not sustainable.*

A writ of *mandamus* will not issue, unless a person, corporation, or an inferior tribunal has to perform a public duty which that agency neglects or fails to perform.

The authorities came to the conclusion, after a study that the indirect consequences of the free grant of permission in Form "P" were very adverse to the foreign exchange position. Hence a decision was finally taken not to grant " P " Form approval for proceeding abroad, except for specified reasons. The true criterion in judging the powers of the Reserve Bank, is that transactions which by their character, may affect the foreign exchange situation, adversely, whether directly or indirectly, would be included within the scope of the Bank's regulatory powers.

A person would have no enforceable right to obtain such a permission, unless the Bank is exceeding its power, or is acting arbitrarily. The corollary is that the Bank has no duty to grant the permission, enforceable in law, so long as it is acting upon principle; when that principle is adumbrated, after a consideration of relevant factors, the question whether the Court may or may not agree with the policy adopted, is really irrelevant. No *mandamus* will lie.

The claim of the respondent is not based upon any right and the power of the Reserve Bank to restrict permission is not in dispute. What is claimed is that the restriction ought not to be imposed where the tour abroad does not directly impinge on the foreign exchange resources, or involve the release of foreign exchange. That is too limited a view of the powers and functions of the Bank. The matter should be judged, not merely in relation to the facts of a given instance, but in relation to a policy, and to the conceivable consequences, direct or indirect, of a large number of such cases.

V. K. Thiruvenkatachari instructed by *M/s. King & Patridge*, for Appellant.

N. S. Raghavan, for Respondent.

V.S. ——— *Appeal allowed.*

Venkatadri, J.
9th September, 1965.

Mohammed Yusufi *v.* Rangaswami.
A.A.O. No. 222 of 1962.

Civil Procedure Code (*V of* 1908), *sections* 146, 151, *Order* 34, *rule* 5, *Order* 21, *rule* 89—*Sale in pursuance of the mortgage decree and purchase by third party—Declaratory decree-holder in a suit for specific performance against the mortgagor—Deposit and application to set aside sale—Maintainability.*

In 1957 the final decree in the mortgage suit was made. The appellant in 1958 obtained a declaratory decree against the mortgagor in a suit for specific performance. The first respondent purchased the property in execution of the final decree, on 19th November, 1960. The appellant on 31st July, 1961, deposited the balance amount into Court and applied that the sale may be set aside.

Held, the appellant did not in furtherance of the decree obtained in the suit for specific performance, obtain a conveyance. He has no title to the property, and thus can have no interest to entitle him under Order 21, rule 89 to deposit the amount and to have the sale set aside. Further the word ' defendant ' in Order 34, rule 5 would only mean a defendant in the suit and does not mean anybody who has an interest in the equity of redemption. The application under Order 21, rule 89 is itself barred by limitation. Even assuming that the appellant can make use of

section 146 of the Code, he is not a representative in interest of the judgment-debtor because he did not possess any interest possessed by the defendant or judgment-debtor in the suit property. He is not entitled to make the application for setting aside the sale.

P. Sherfuddin and *Amjad Nainar*, for Appellant.

V. Ratnam, for 1st Respondent.

R. Sitaraman, for 3rd Respondent.

V. S. *Appeal dismissed.*

Venkatadri, J. 10*th September*, 1965.

Meenakshi Ammal *v.* Commissioner of Hindu Religious and Charitable Endowments, Madras. A.A.O.No. 197 of1962.

Civil Procedure Code (*V of* 1908), *section* 92 *and Order* 23, *rule* 3—*Scheme suit in regard to the administration of a school, a public trust—Compromise of suit—Consent of Advocate-General, not necessary—Power of Court to subject terms of compromise to close scrutiny and to reject for valid reasons.*

A suit under section 92 of the Civil Procedure Code can be compromised like any other case and without the consent of the Advocate-General. Order 23, rule 3 of the Code does not suggest that any particular form of suit is outside the scope though the question as to what is lawful agreement or compromise will vary with the very character of different suits.

In recording a compromise in respect of suits relating to public trusts, the Court has plenary powers to subject the terms to scrutiny and reject the compromise for valid reasons.

R. Gopalaswami Iyengar and *S. G. Subramaniyan*, for Appellants.

M. Chenniappan, for the Government Pleader.

A. Narayanaswami, for Respondent No. 2.

V. S. *Appeal allowed.*

Anantanarayanan, J. 17*th September*, 1965.

Pichai Udayar *v.* Doraisami Udayar. C.R.P. No. 1608 of 1962.

Practice—Advocate's fees—Legal Practitioners Act (*XVIII of* 1879), *section* 27, *rules* 31 *and* 35 *of the Rules framed under—Preliminary decree—Direction for costs to be provided for in the final decree—Final decree specifying amount due to plaintiff—Court-fee paid on that amount—Rule* 31 (*ii*) (3) *applies—Rule* 35 *relating to applications, not applicable.*

The preliminary decree, directed that costs will be ascertained and awarded or provided for in the final decree to be passed. The suit claim was estimated upon a notional basis. But finally the actual amount due to the plaintiff was ascertained at Rs. 12,041-12-11. The plaintiff paid Court-fee on that basis. Under rule 31 of the Rules relating to Legal Practitioners the Counsel's fee will have to be calculated upon the tariff which is included in sub-clause (3) of Clause (ii) of rule 31. The Court awarded Rs. 680 adopting this correct basis. It is not rule 35 of the Civil Rules of Practice providing a sum of Rs. 25 that is applicable to the case here.

N. Sivamani and *M. V. Krishnan*, for Petitioner.

K. S. Desikan, for Respondents 1 to 5 and 7.

V.S. *Petition dismissed.*

BAR COUNCIL RULES.

STANDARDS OF PROFESSIONAL CONDUCT AND ETIQUETTE*

PREAMBLE.

An Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligation, an Advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned.

SECTION I—*Duty to the Court.*

1. An Advocate shall, during the presentation of his case and while otherwise acting before a Court, conduct himself with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial officer, it shall be his right and duty to submit his grievance to proper authorities.

2. An Advocate shall maintain towards the Courts a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community.

3. An Advocate shall not influence the decision of a Court by any illegal or improper means. Private communications with a Judge relating to a pending cause are forbidden.

4. An Advocate shall use his best efforts to restrain and prevent his client from resorting to sharp or unfair practices or from doing anything in relation to the Court, opposing Counsel or parties which the Advocate himself ought not to do. An Advocate shall refuse to represent the client who persists in such improper conduct. He shall not consider himself a mere mouth-piece of the client, and shall exercise his own judgment in the use of restrained language in correspondence, avoiding scurrilous attacks in pleadings, and using intemperate language during arguments in Court.

5. An Advocate shall appear in Court at all times only in the prescribed address, and his appearance shall always be presentable.

6. An Advocate shall not practise before a Judge sitting alone or a Bench of Judges, if the Judge or any member of the Bench is related to the Advocate as husband, father, grandfather, son, grandson, brother, father-in-law, son-in-law, brother-in-law, uncle, nephew, first cousin, wife, mother, daughter, sister, mother-in-law, daughter-in-law, sister-in-law, aunt or niece.

7. An Advocate shall not wear bands or gown in public places other than in Courts except on such ceremonial occasions, and at such places as the Bar Council of India or the Court may prescribe.

8. An Advocate shall not appear in or before any Court or Tribunal or any other authority for or against an organisation of an institution, society or corporation, if he is a member of the Executive Committee of such organisation or institution or society or corporation. "Executive Committee", by whatever name it may be called, shall include any committee or body of persons, which, for the time being, is vested with the general management of the affairs of the organization or institution, society or corporation.

9. An Advocate should not act or plead in any matter in which he is himself pecuniarly interested.

ILLUSTRATION.

I. He should not act in a bankruptcy petition when he himself is also a creditor of the Bankrupt.

II. He should not accept a brief from a company of which he is a director.

10. An Advocate shall not stand as a surety, or certify the soundness of a surety, for his client required for the purpose of any legal proceedings.

SECTION II—*Duty to the Client.*

11. An Advocate is bound to accept any brief in the Courts or tribunals or before any other authority in or before which he professes to practise at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

* Rules under section 49 (c) of the Advocates Act (1961), added as Chapter V in Part III of the Bar Council Rules by Resolution No. 51 of 1965 dated 10th and 11th April, 1965 of the Bar Council of India, New Delhi.

12. An Advocate shall not ordinarily withdraw from engagements, once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case he shall refund such part of the fee as has not been earned.

13. An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an Advocate if he can retire without jeopardising his client's interests.

14. An Advocate shall, at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either engaging him or continuing the engagement.

15. It shall be the duty of an Advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.

16. An Advocate appearing for the prosecution in a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishing the innocence of the accused shall be scrupulously avoided.

17. An Advocate shall not directly or indirectly, commit a breach of the obligations imposed by section 126 of the Indian Evidence Act.

18. An Advocate shall not, at any time, be party to fomenting of litigation.

19. An Advocate shall not act on the instructions of any person other than his client or his authorised agent.

20. An Advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.

21. An Advocate shall not buy or traffic in or stipulate for or agree to receive any share or interest in any actionable claim. Nothing in this rule shall apply to stock, shares and debentures or government securities, or to any instruments which are, for the time being, by law or custom, negotiable or to any mercantile document of title to goods.

22. An Advocate shall not, directly or indirectly, bid for or purchase, either in his own name or in any other name, for his own benefit or for the benefit of any other person, any property sold in the execution of a decree or order in any suit, appeal or other proceeding in which he was in any way professionally engaged. This prohibition, however, does not prevent an Advocate from bidding for or purchasing for his client any property which his client may himself legally bid for or purchase, provided the Advocate is expressly authorised in writing in this behalf.

23. An Advocate shall not adjust fees payable to him by his client against his own personal liability to the client, which liability does not arise in the course of his employment as an Advocate.

24. An Advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client.

25. An Advocate should keep accounts of the client's money entrusted to him, and the accounts should show the amounts received from the client or on his behalf, the expenses incurred for him and the debits made on account of fees with respective dates and all other necessary particulars.

26. Where moneys are received from or on account of a client the entries in the accounts should contain a reference as to whether the amounts have been received for fees or expenses, and during the course of the proceedings, no Advocate shall, except with the consent in writing of the client concerned, be at liberty to divert any portion of the expenses towards fees.

27. Where any amount is received or given to him on behalf of his client, the fact of such receipt must be intimated to the client, as early as possible.

28. After the termination of the proceeding, the Advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.

29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.

30. A copy of the client's account shall be furnished to him on demand provided the necessary copying charge is paid.

31. An Advocate shall not enter into arrangements whereby funds in his hands are converted into loans.

32. An Advocate shall not lend money to his client for the purpose of any action or legal proceedings in which he is engaged by such client.

Explanation.—An Advocate shall not be held guilty of a breach of this rule, if, in the course of a pending suit or proceeding, and without any arrangement with the client in respect of the same, the Advocate feels compelled by reason of the rule of the Court, to make a payment to the Court on account of the client for the progress of the suit or proceeding.

33. An Advocate who has, at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, shall not act, appear or plead for the opposite party.

SECTION III—*Duty to Opponent.*

34. An Advocate shall not in any way communicate or negotiate upon the subject matter of controversy with any party represented by an Advocate except through that Advocate.

35. An Advocate shall do his best to carry out all legitimate promises made to the opposite party even though not reduced to writing or enforceable under the rules of the Court.

SECTION IV—*Duty to Colleagues.*

36. An Advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or procuring his photograph to be published in connection with cases in which he has been engaged or concerned. His signboard or name-plate should be of a reasonable size. The signboard or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organization or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or an Advocate-General.

37. An Advocate shall not permit his professional services or his name to be used in aid of, or to make possible, the unauthorised practice of law by any lay agency.

38. An Advocate shall not accept a fee less than the fee taxable under the Rules when the client is able to pay the same.

39. An Advocate shall not enter appearance in any case in which there is already an Advocate on record except with his concent.

SECTION V—*Restrictions on other employments.*

40. An Advocate shall not personally engage in any business; but he may be a sleeping partner in a firm doing business provided that, in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.

41. An Advocate may be a Director or Chairman of the Board of Directors of a Company with or without any ordinary sitting fee, provided none of his duties are of an executive character. An Advocate shall not be a Managing Director or a Secretary of any Company.

42. An Advocate shall not be a full-time salaried employee of any person, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an Advocate so long as he continues in such employment.

43. An Advocate who has inherited, or succeeded by survivorship to, a family business may continue it, but may not personally participate in the management thereof. He may continue to hold a share with others in any business which has descended to him by survivorship or inheritance or by will, provided he does not personally participate in the management thereof.

44. An Advocate may review Parliamentary Bills for a remuneration, edit legal text-books at a salary, do 'Press vetting' for Newspapers, coach pupils for legal examinations, set and examine question papers; and, subject to the rules against advertising and full-time employment engage in broadcasting, journalism, lecturing and teaching subjects, both legal and non-legal.